

15 Video Lectures on Indian Constitution

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NALSAR University of Law

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Chapter 1 - Lecture 1

Lecturer: Prof. (Dr.) Faizan Mustafa

Namaskar, hello welcome to Nal sir University of Law for the online course on Indian Constitution sponsored by Department of Legal Affairs Ministry of Law and Justice Government of India. I am Faizan Mustafa, I am the Vice Chancellor of Nal sir and the President of Consortium of National Law Universities. We are starting today an online course on Indian Constitution. Now why we should do this course? We should do this course because this course will make us better citizens of India and help us in understanding our interesting, glorious constitutional journey. It will help us understand that constitution is the supreme law of the land and all laws are subordinate to it and must be consistent with it. The course will also tell us what are our fundamental rights, what are restrictions on our fundamental rights. The course will also help us in understanding power structure of the country, what are the powers of various organs of the government, legislature, executive, judiciary, what parliament can do, what parliament cannot do, what executive can do, what executive cannot do, what is the kind of relationship center has with states, the course will also help us in getting familiarized with some of the important provisions of the constitution of India and some of the leading judgments of our codes. It will help us in appreciating and understanding the ongoing developments regarding Indian Constitution and the new proposals of reforms. Now what are the course details? Anyone who has passed class 10 can join this course. What is the duration of the course? We will try to finish this course in 15 lectures and at the end of the course there will be an examination. Not a very difficult one but you will have 50 multiple choice questions and to get certificate from Nal sir University of law which you know UGC has categorized as category 1 university and NAC has accredited with the highest score of 3.61 out of 4 with a double plus rank. And the language of the course English, what is the course syllabus, what are we going to deal? In this course we will look at how constitutions are drafted, when a country drafts a constitution, what is that particular point of time at which a country decides that let us have a new constitution or let us draft our own constitution. What a constitution should contain, what are the various types of the constitution? We will understand it in the very first lecture of this course. Followed by the kind of debates we have in our Constituent Assembly. We had a long history of constitutional developments in the country. We were ruled by the British and there was a whole struggle for countries independence under the national movement. So how Constituent Assembly was framed, how they drafted the constitution, who are the leading participants in the discussions on the constitution will be discussed in this course. Then we will discuss the preamble of the constitution. We are very

proud of our preamble because preamble tells us our aspirations, the kind of India we want to create. We will discuss what is there in the preamble, how preamble can be amended and how preamble is used in the interpretation of the constitution. We will also discuss in this course, who is an Indian citizen, how Indian citizenship is acquired. Then we will discuss fundamental rights for any constitution, the most important provisions deal with fundamental rights. We have number of fundamental rights. One right to property has now been deleted by the 44th amendment. So we will discuss right to equality, what is reasonable classification, why constitution forbids class legislation, but permits classification. We will also discuss the whole question of reservation. How long reservation would continue, what improvements can be made in our reservation policies. All the time and democracy, there is a discussion about freedom of speech and expression and the limits of freedom of speech and expression. We have discussions about sedition, should we retain the provision or decriminalize it. Similarly, the provision of blasphemy, the provision of defamation, which many people say should be decriminalized, but recently our Supreme Court upheld the constitutionality of defamation provision and then go to the most important fundamental right. The right to life and liberty and discuss cases about privacy, about Adhaar and how Supreme Court has included right to privacy within the right to life and personal liberty. Indians are essentially religious people. And therefore our secularism is different from European secularism. We adopted secularism because we want to be a religion neutral state because secularism is the core of modernity. What is freedom of religion? Am I entitled to each and every practice of my religion under freedom of speech and expression? The answer is no because our Supreme Court has developed what is called doctrine of essentiality under which it is the Supreme Court which decides what is essential and what is non-essential feature of my religion. And I am entitled only to essential religious practices. There have been issues about religious prayers in the schools. We will look at Article 28 of Indian Constitution. Then Indian Constitution is considered to be a far-sighted, inclusive document which promotes multiculturalism and confers on linguistic and religious minorities right to establish educational institutions of their choice and to administer those institutions. It confers on every citizen of India who has a distinct language, script and culture to conserve his culture, conserve his script and conserve his language. We will also discuss about Directive Principles of State Policy. The Directive Principles of State Policy are the positive obligations of the state while fundamental rights are negative restrictions on the power of the state. What is the relationship between fundamental rights and Directive Principles? What is the relationship between fundamental rights and fundamental duties will also be discussed? Similarly, we will also discuss the Union Executive, the Prime Minister, President Relationship, President's audience making power many a times when

parliament is not in session. The President has to promulgate ordinances. We need to discuss appointment of judges, how judges are appointed, what is the collegial system, what is this power of judicial review, is power of judicial review anti-democratic because even when parliament has unanimously passed the law, few judges can strike it down. Then we will discuss the amending powers. No one generation can claim the monopoly of wisdom. Unfortunately, the framers of Indian constitution were visionary people of their generation but they were aware of their limitations and that is why to keep constitution as a living document, they have given power to the future generations to suitably amend the constitution whenever such a need arises. We will also discuss some of the important amendments and the kind of a tussle we have seen between the parliament and the supreme court on the whole question of power to amend the constitution. We will also discuss the doctrine of basic structure which was developed by the supreme court in the celebrated case of *Keshavanand Bharati* who recently passed away. We will also discuss the distinction between constituent power and ordinary legislative power. And this is how we will give you a bird's eye view of our constitution. If you know all these subjects, you will definitely be much better informed, aware citizen of India and can discharge your duties as citizen more efficiently. Let me now come to the first lecture of this course. In this lecture, we are going to discuss what is constitution, when a constitution is drafted, what are the types of the constitution, what constitution should contain, etc. etc. Now do the first question, what is constitution? Constitution is the holiest book for any constitutional democracy. If you are a constitutional democracy, for people who may follow certain religions, the divine books of those religions may be important. But for a nation, there will be only one holy book and this sacred book is called Constitution of that country. Constitution is the supreme law of any country. You know the principle in law is ignorance, juris, non-excuse it. Ignorance of law is no defense. Law is everywhere from cradle to grave and we must know laws. In the hierarchy of laws, at the top of the pyramid is the constitution because it is the supreme law of land and no law can be there which contravenes or violates the constitution. If any law is passed by any legislative assembly of the state or by the union parliament and such a law is in conflict with the provisions of the constitution, that law is to be stood down by the courts as unconstitutional and null and void. Constitution is also a kind of a sacred pact, a kind of a Solomon contract, a social contract between people and the state. What are the terms of those contract? And what conditions the people have agreed to give their allegiance and obedience to the state is stated in the constitution. The constitution thus incorporates people's aspirations of the kind of society and the country they want to make. It tells us about our fundamental rights and how can we use those rights? And when our rights are violated, what redressal mechanism is available to us? It also simultaneously tells us

what are our fundamental duties, rights and duties are correlated. You cannot have your right without a corresponding duty and therefore they go together, constitution of India in 1976 got fundamental duties inserted by the 42nd amendment. Constitution also tells us about the powers of various organs of the government. What are the powers of the legislature? Powers of the executive, powers of the judiciary. It also tells us about the kind of central state relationship. Then the next question which we must understand and answer is, why a country drafts a constitution? A country drafts a constitution to achieve constitutionalism. What is this constitutionalism? Constitutionalism is an idea of limited government. Constitutionalism furthers and promotes the same old idea which ancient Indian philosophy has been terming as Raj Dharma. What is the duty of the king? What is the duty of the state? How state has to conduct itself? That is what is written in the constitution. So a country wants to make a document in which it states Raj Dharma, in which it states limitations on the powers of the state. And this a country drafts a constitution because it wants that no organ of the government should cross what is term? Constitutional boundaries. And it also recognizes. Constitutional rights. In the rights jurisprudence, we do not say constitution, converse rights. Because the idea is every human being is born with certain natural, inalienable, indivisible rights. So constitution recognizes those rights. Then when a country drafts a constitution? What is that particular point of time at which a country feels that it must now draft a constitution? The answer to this question can be given in one word, break. Break from the past. When in the history of that country, it reaches a point which can be termed as a break from the past. Then a country which is making a new beginning can set the new agenda. And this new agenda is incorporated in the constitution. When can we say that a country has reached that point which can be termed as break from the past? I can think of four situations. One is, and which is the case with most third world countries that they get independence from colonial powers. So they got, for instance, we got independence from Britain in 1947. And therefore, we started our process of drafting the constitution in 1946 itself. We will tell the details of this in the next lecture. Or when there is a revolution. So if you have Bolshevik revolution, you have French revolution. Whenever there is a revolution, after the revolution, you would make a constitution. Similarly, when a country gets partitioned, it is a new beginning for both the countries. And therefore, the generally draft a constitution. Similarly, when two countries come together and merge with each other, it is a new beginning for them. And therefore, the stage is set for the drafting of the constitution. What are the various types of the constitution? Before we go to Indian constitution, I think it is important that we get this theoretical framework. Constitutions are of various types. You can have a written constitution. You can also have an unwritten constitution. England for instance is set to have an unwritten constitution.

Because in England, there is no one document which is called Constitution of Great Britain. The classical example of a written constitution is that of United States of America, Constitution of India. Most countries today have written constitution. A written constitution is a written constitution, but there are things which are not written in this constitution. Similarly, we can also classify constitutions based on the kind of center-state relationship they had. So if center is more powerful, it is set to be a unitary constitution. If center and states coordinate with each other, there is a distribution of power between them. And each operate within its own is a lot of sphere. It is called a federal constitution. The constitutions are also classified. On the basis of kind of governmental structure they have. Therefore, if you have a president who have all the powers, it is called the presidential model of government as you have in United States of America. Or you may have parliamentary democracy as we have in India and we have in Great Britain and we have in many other countries. Similarly, constitutions are also classified. On the basis of kind of amending process they have. If the process to amend the constitution is very difficult, it is called rigid constitution. The constitution of United States has a very difficult cumbersome amending process. If the amending process is easy as is there in the New Zealand, New Zealand's constitution can be amended like an ordinary law. So it is the most flexible constitution of the world. Indian constitution has a blend of both. They are flexible as well as rigid. Some provisions of our constitution can be amended like an ordinary law. But for other provisions not only parliament has to pass those amendments by two-third majority, but ratification by half of the states is required. Then what a constitution should condemn? What should be written in the constitution? In my view, the constitution should not say too much. They should be brief. And therefore I would say the constitution must contain the minimum. And on this parameter, the best constitution in the world is the constitution of United States of America. On the other hand, we have almost tried to say everything in our constitution. And that is why Indian constitution is the lendiest constitution in the world. If you look at our original constitution, we had as many as 395 articles, 22 parts and 8 schedules. Subsequently, we brought in number of amendments. We will discuss that when we reach amending process of Indian constitution. Now to summarize today's lecture, what did we learn today? We learned that constitution is the supreme law of the country, that constitution signifies a compact between people and state. Constitution limits the power of the state. It tells us about our rights. It tells us about our duties. It gives us an idea about the power structure of the state. And constitution is drafted when there is a break from the past. Ideally, a constitution must be brief. Now in the next lecture, we will discuss the British colonial government in India, how the Indian national movement fought for constitutional reforms, how British agreed to formation of our constant assembly, the process which Indian constant assembly adopted in drafting

the constitution, what kind of choices they made for our constitution. This will be an important lecture. Thank you very much for your patience and see you soon in the next lecture. Thank you.

Chapter 2 - Lecture 2

Lecturer: Prof. (Dr.) Faizan Mustafa

Navashkar, welcome to online course on Indian Constitution. Today, we are going to talk about Constituent Assembly debates and the choices which framers of Indian Constitution made about our Constitution. You may recall in the last lecture, we talked about what is a Constitution, why constitutions are made, what constitutions should contain, how constitutions are classified, etc. Now come to this very important subject, but first of all, you should know how constitutions are drafted world over. So one method is that the Constitution will be drafted when there is a break from the past. First there will be direct election of members of the Constituent Assembly. Once the Constitution is drafted, it will be put to vote. This method has not been adopted in India. How was Constitution drafted? How we adopted it, we will discuss today. So let us first of all talk about the evolution of Constitution and modern India. As you know that the East India Company was incorporated in London in 1600, then they came to India as a trading company. And due to the rivalries amongst Indian princes, they were able to get a control of our country. In 1857, we had the first war of independence against the British, against the East India Company and all Indians united under the banner of last Mogul Emperor Bhaadarsha Zafar. Nevertheless, after the war, the British government took the direct control of India and initiated what can be termed the first phase of constitutional reforms. In 1861, Indian Council Act was passed, but no Indian was made its member. 1885 is a mild stone in our constitutional history, because Indian National Congress was founded. And in 1892, Indians were included in the Council, but not in the executive council of Governor General. That brings me to 1909 when we had a first major reform of 20th century, what are called Government of India Act 1909 or Minto Modular Reform. Now in the legislative council, greater representation was given. The membership increased from 16 to 60. Indirect election of prevention, council was started. Now three members were from traders, universities, tea plantation, municipalities and Muslims. Then as we move forward, another major mild stone in our constitutional history was Government of India Act 1919, what is called Montego-Jemford Reform. Now it can be said to be the first significant constitutional document. It gave autonomy to the provinces, but made a classification between provincial and central subjects. The Governor General in Council, as far as Act is concerned, did not clearly mention that Indians will be included. All decisions were to be made by the majority, but Governor General was given the power to overrule or the power of veto. As we move forward, we have to understand that this 1919 Act also talked of two houses by camera legislation. So there was to be a legislative assembly and there will be a council of state. The council

of state out of 60 had official members, but the act said official members will not exceed more than 20. So 40 members will be elected in some manner. And then the legislative assembly had 140 members, 100 were to be elected, 40 to be nominated with 26 official members. In terms of powers, substantial powers, including power to modify or repeal laws, enacted by the British Parliament was given. And now this was a significant development because the mother parliament, the parent parliament, British parliament should have had the overriding power, but it was a major reform because an Indian house had the power to modify or repeal laws made by the parliament in London. But the executive control, overriding control of the executive continued even under the government of India Act 1919. Now the act also introduced hierarchy or dual government in provinces. So there was a classification between reserved subjects and transferred subjects. The reserved subjects which were reserved with the governor were revenue, administration of justice and police. The transferred subject had public health, education, local self-government. And the provincial legislature also, the composition differed from state to state. So in Bengal it was to consist of 139 members and 50 members, Assam had 50 members. Then you had a famous Jalianwala, Bagh Masekar because of which these developments, you know, had a major obstruction. Another big milestone in our constitutional evolution is Motilal Nehru Committee. The Britishers has taunted us and said we will not be able to draft our constitution. A committee headed by Motilal Nehru quickly drafted a constitution. This constitution was significant in terms of providing adult suffrage. The constitution will have a right to vote, providing for federalism and providing for rights. Then in 1927 you got the Simon Commission. The report was submitted in 1930. Now the Congress from 1934 onwards specifically included in its official demands, constitution of a constant assembly. So that a constitution for India is drafted by Indians. No one should dictate us what kind of constitution we want to have. And 1935 Government of India Act is the major significant constitutional development because even today, two-third of our constitution is based on Government of India Act. Of course it did not have fundamental rights. Now you had federalism in the Government of India Act 1935. You had governors, provinces and Indian states or what were called princely states. The states were given an option to join federation through instrument of accession. In the context of Article 370, you must have heard of this term instrument of accession. Now this instrument of accession was also there under the Government of India Act 1935. So every princely state had to sign instrument of accession to join this federation. But the precondition for the constitution of federation was consent of half of princely states. Now moving forward and looking more intensely at the Government of India Act, which as I said is a major milestone of our constitutional evolution. One lie, Government of India Act 1919, which had provided the direkiet provinces, the 1935 Act provided direkiet center and

made governor general too powerful. Here the legislature was just by courtesy. Again, there was a division because it was a federal constitution, central and provincial subjects. Now Government of India Act was never enforced at the central level. But for provinces, it came into being in 1937. There were residue powers which governor general could give either to the center or to provinces. This was something very, very important and something very unique. As you know, in a federal constitution, generally the powers of the center are listed and residue is given to the states or in the other model, the power of the states are listed and the residue is given to the center. Here it was provided that the governor general could give residue power either to the center or to the provinces. It created powerful center and that's why Government of India Act 1935 in a way envisaged a quasi-federal polity. One of the greatest weakness of Government of India Act 1935 was direct center and it did not create in a sincere way responsible government. Of course, it provided for council of state which was a permanent house like future Rajya Sabha. The composition was that from Indian provinces 156 members will come from princely states, 100 and 4 members will come. Then it provided for legislative assembly which was like Lok Sabha. It had 125 members from the princely states and 250 members from the provinces elected by the provincial assemblies. In terms of powers, the legislative assembly was more powerful like Lok Sabha and it had all the powers and in terms of financial matters, it had greater powers. As we move forward to post 1935 India in terms of constitutional developments, the congress ministers resigned in 1939. The federation at center was postponed indefinitely. In 1942, you would get the Kilsby commission which has said that after the World War II, there will be an independent dominion in Commonwealth and there will be an elected body to frame the constitution. So, our long-standing demand of a constituent assembly was considered. The members of the constitution body were to be elected by an electoral college formed by the provincial legislatures. This is what eventually happened and our constituent assembly members came from the provincial legislatures. The princely states were also to send their representatives to the constituent assembly. This also happened when the constituent assembly was eventually constituted. After the World War II in 1946, you got the cabinet plan and see the British people voted out Prime Minister Winston Churchill. You were good as a Prime Minister during war, but post war Labour Party came to power and Labour Party was interested in giving independence to India. On May 15, 1946, the proposals of the cabinet plan were made public. It also proposed a federation. The centre was to have defence for an affairs and communications. The residue subjects were given to the provinces. The constituent assembly was to be formed immediately and it was provided that there will be one seat for one million people and subsequently these seats were distributed between major communities. The elections happened in 1946. The national government

was formed on September, 1946 under Pandit Jawaharlal Naru with 14 ministers, 6 congress ministers, 5 Muslim League ministers and 3 of minorities. Muslim League after initial reluctance joined in October 1946. And the first meeting of our constant assembly was held on December 9, 1946 under the chairmanship of Sachidan and Sinha, who was nominated as the interim president of newly constituted constituent assembly. However, constant assembly worked. What are the various choices it made? What are the various phases of its working? Let us try to understand. Dr Rajendra Prasad, who was elected as president, 3, BN Rao was appointed as the advisor to the constant assembly. Initially, the plan was to have forever genies, who was also helping Ceylon in the drafting of their constitution and subsequently held Pakistan in the drafting of their constitution. But Gandhiji suggested that we should have an Indian as the advisor to our constant assembly and be a Rao really played a major role in the drafting of our constitution. The constant assembly was to consist of 389 members, 292 members from governors provinces, 4 members from chief commissioners provinces, as many as 93 members were nominated by the princely states. You can see that India at that time had about 600 princely states. The credit of integration of these princely states with India largely goes to Sadar Balabhai Patate. Then if you look at the election results, Congress 1199 of 210 general seats, Muslim League had about 73 out of the 78 Muslim seats, out of 296 members, 207 members took part in the proceedings on December 9, 1946, the first day of the meeting of the constant assembly. Now constant assembly used to work through committees. So several committees were constituted. One of the most important committee was the drafting committee, which was headed by Dr. Bhimram Bhatkar, the Union Powers Committee and Union Constitution Committee were headed by Pandit Jawaharlal Nehru. Provincial Constitution Committee was headed by Sadar Balabhai Patel and Sadar Balabhai Patel also headed the advisory committee on fundamental rights and minority rights. So there were various committees and first in the committee discussion used to take place and then it used to come to the main body and then it used to go to the drafting committee and then used to come back to the main body. So it was a unique experiment and the debates of these constant assembly are available in 12 volumes and the kind of discussions they have are revealing and they demonstrate the strength of Indian democracy. The wisdom of framers of our constitution because it is very difficult for any new democracy to draft this kind of enlightened, visionary, far-sighted constitution. Now if you look at the working of the constant assembly, on December 13, 1946, objective resolution was moved by Pandit Jawaharlal Nehru and it was passed on January 22, 1947. In the next lecture I will tell you that the predominant view is that the preamble of the constitution is largely based on this objective resolution. On July 22, 1947, our national flag was adopted and then on 15 August 1947, we will get

that biggest day of our history. The red letter day of our history when India was declared as an independent nation, finally the constitution was adopted on November 26, 1949. It took two years, 11 months and 18 days for the constituent assembly to draft world's land-based constitution. Now if you look at the working of the constituent assembly, you can see that the three phases were there. From December 11, 1946 to August 14, 1947, we are not yet independent. So the constituent assembly was just doing the job of drafting the constitution. That is to say it was working merely as a constituent assembly. On August 15, 1947, we got independence. So constituent assembly now was working not only as the constituent assembly but also as the visual parliament of independent India. So it was doing a dual job. It was drafting the constitution and simultaneously performing the functions of interim parliament. Now the constitution drafting came to an end on 26 November, 1949 when the constitution of India was adopted. So from 27 November, 1949 till 1952 when we had our first general elections, constituent assembly was working as visual parliament of independent India and it also passed amendments. So this same constituent assembly acting as parliament till 1952 made certain amendments. The first amendment was a major amendment by which the 9th schedule was added to the constitution. Now if you look at the choices which our framers made in terms of the constitution which we have today, Sri Bheon Rao, constituent assembly advisor had collected all the constitutions and all the best provisions of those constitutions had been incorporated in the Indian constitution. These thesis is not entirely true as we did make innovation after the first world war. Seventeen democracies were set up but subsequently only few survived as democratic states. Several democratic countries turned authoritarian. Particularly Portugal, Poland, Japan, Germany, they all reverted to authoritarianism. We adopted parliamentary democracy rather than the American system of presidential form of government because we wanted continuity for last 200 years. Being a British colony, we were used to parliamentary procedures and we did not want to create this kind of a system where personal charisma of one person will decide who rules the country. We made another major choice in my opinion in terms of giving universal adult suffrage in spite of literacy in our country. In my opinion it was a bold and courageous choice that every Indian will have a right to vote. Dr. Bhimra Ambedkar rightly said, French eyes is right not a privilege. Unlike government of India, we did not say that only those who have land will have right to vote. Only those who are educated will have right to vote. Only those who pay income tax will have right to vote. We made it a right of each and every Indian rather than the privilege of elite. And this was a major choice. Similarly, we said we will have a single citizenship. As opposed to unitary system, we adopted federalism. No country adopts federalism out of its own choice, free choice because unitary government is better. We knew that we are a big country. We have several regional aspirations and

therefore we opted for federalism rather than a unitary state even though great Britain is a unitary state. Similarly, we adopted fundamental rights from United States of America but unlike United States of America which does not include in the constitution the restrictions which can be imposed on the fundamental rights. We preferred to write those restrictions in the text of the constitution. That's why we are saying it was not a blind borrowing. We borrowed from United States of America several things but we did not borrow due process of law. When we were drafting our article 21, we said we will have procedure established by law rather than due process of law. It is a different story that subsequently in Maneka Gandhi and several other cases Supreme Court virtually brought in due process of law. We also borrowed from Ireland directive principles of state policy which are the positive obligations of the state. The constitution was written both in English as well as Hindi. Each member signed both the copies as far as the English copies concerned. The constitution of India on its adoption had one leg 17,369 words. Now it is the longest constitution of the world. It had 22 parts with 395 articles and 8 schedules. And remember our original constitution was not tied. It was handwritten by Sri Prem Narayan Raizada. And each page of the constitution was decorated by artists from Shantiniketan, such as Ram Manohar Sanyal and Nandalal Bose. These decorations they depict our cultural history. So there is a mention of Mahabharat, there is a mention of Lord Ram, there is a mention of Emperor Akbar. Now what did we learn today? We learned the evolution of our constitution post 1857. How the Constituent Assembly was constituted, how it worked, what choices it made and why it made those choices. In the next lecture we are going to talk about a very important subject, the preamble of Indian constitution. What is there in the preamble? Is it part of the constitution? How it can be amended, what use of it can be made in interpreting the constitution, we will learn in the next lecture. Thank you very much, Dr. B.R. Ambedkar.

Chapter 3 - Lecture 3

Lecturer: Prof. (Dr.) Faizan Mustafa

Namaskar, welcome to online course on Indian Constitution which is being offered by Nalasar University of Law in collaboration with Ministry of Law and Justice Government of India. In the last lecture we talked about how Indian constitution was drafted, we talked about the composition of the Constituent Assembly, the choices which were there before the Constituent Assembly and the choices they made. Today we are going to talk about a very important topic of our constitution that is the preamble of the Constitution. Let me first of all read the preamble of our constitution. We the people of India having solemnly resolved to constitute India into a sovereign socialist, secular, democratic republic and to secure to all its citizens, just as social, economic and political. Liberty of thought, expression, belief, faith and version, equality of status and of opportunity and to promote among them all fraternity, assuring the dignity of the individual and the unity and integrity of the nation. In our Constituent Assembly, this 26th day of November 1949, do hereby adopt, enact and give to ourselves this constitution. So Indian constitution was adopted on 26th of November 1949. But the constitution was enfold on 26th January 1950. So 26th November 1949 till 2014 used to be celebrated as laudate. But in 2014, the Government of India and in my opinion rightly decided that this day should be celebrated as a constitution day. And therefore now we call it a constitution day and celebrate it every year. Now the first question which should come to your mind, why constitutions need to have a preamble? Preamble means introduction. It tells us the source of the authority of the constitution. The most fundamental question for any constitution is from where this constitution draws its authority. So it is the preamble which will tell us what is the source of the authority of this constitution. We will discuss it later. Preamble also indicates ideals, goals and vision of framers of the constitution. It will tell us the values of our constitution or any constitution in the world would wish to achieve. The preamble also tells us the kind of society the constitution envisages. In the famous case of Golaknath versus state of Punjab on 1967 judgment, Chief Justice Subaraw had said, preamble contains in a nutshell the ideals and aspirations. So our aspirations as a nation, if you want to read you should come to the constitution of India, read our preamble and I just read it to you. Next crucial question is do all constitutions have preamble? The answer is not a clear yes, not a clear no. But legally speaking it is not mandatory. To have a preamble in a constitution. But then most constitutions in the world really have a preamble. But you will be surprised to know as many as 54 constitutions in the world do not have a preamble. Which are these constitutions? Belgium, Botswana, Brunei, Canada, Denmark, Finland, Italy, Malaysia, Maldives,

Netherlands, New Zealand, Norway, Oman, Qatar, Romania, Singapore, Sweden, Thailand etc. It is a long list about one fourth constitutions in the world don't have a preamble. In our own country, government of India act which was a constitution, a kind of constitution did not have a preamble. We borrowed a lot from the government of India act. Out of 134 constitutions in the world which do have a preamble, how many of them call it a preamble? 87 and there are 47 constitutions where some kind of preamble is there. But it is not called preamble. The shortest preamble is that of constitution of Greece. It has mere 11 words. In the name of the holy and consubstantial and indivisible Trinity. This is how the preamble begins. The landiest preamble is in the constitution of Iran which has 3773 words. Chinese preamble is also very landy. It has 1771 words. 121 preambles state the values and goals. So let us talk of what are the common values. If so many preambles refer to values, is there some commonality in the values? Generally, preambles refer to God Almighty. In as many as 60 preambles, there is a reference to God. In the preamble of Albania, Brazil, Uganda, Germany, Greece, Iran, Iraq, Ireland etc. Preambles also talk of sovereignty, independence, territorial integrity of the nation and the right to self-determination. They also make a reference to democracy, rule of law, justice, social justice, freedom, equality, equality before law and human rights. You will also find in preamble invariably reference to peaceful and cordial relations with other countries, prosperity, welfare, humanism, pluralism, protection of interest of minorities. So these are broadly the common values which are referred in the preambles of the world. Coming to the preamble of Indian constitution, which I read to you just now, the question is who drafted this preamble? There is no clear record. But there are three views about the authorship of our preamble. The predominant view is that the preamble is based on the objective resolution which was moved by Pandey Jawaharlal Nehru. The other view is that it was Sri, Sb and Rao, who was the advisor to the constant assembly, who used to be given the credit of drafting the preamble. The third view is that it was the drafting committee of the constitution, which was headed by Dr. Bhimra Om Bhaikar that this drafting committee drafted the preamble. And as you know most members in the drafting committee did not really work. It was largely Dr. Bhimra Om Bhaikar in the opinion of Professor Akash Singh Ratar, who can be given the credit of drafting the preamble of Indian constitution. Now the next crucial question, legal question, is is preamble part of constitution? Now in many ordinary legislations and enactments, the preamble may not be even enacted by the legislature. But as far as the preamble of Indian constitution is concerned, I just told you that it was moved as an objective resolution by Pandey Jawaharlal Nehru. It was eventually adopted at the end on the suggestion of Hassrat Mohani and it was adopted like any other provision of the constitution. So framers of the constitution treated preamble as important, as significant, as any other provision. What is a judicial response to

this question? In the case of *Inre Beru-Bhari*, a 1960 judgment of Supreme Court, the on-rebel Supreme Court said preamble is not the part of constitution and it cannot be amended. This was overruled 13 years later in the famous *His Holiness Keshavanandabharti* judgment where Supreme Court said preamble is part of the constitution and can be amended. His Holiness Keshavanandabharti recently passed away and in a state of *UP versus Dina Nath Shukla* 1997 judgment, it was held that the preamble is the basic structure of the constitution. Many expressions used in preamble have already been held as the basic structure of the constitution, such as democratic character of the country or the secular character of the country. Now if preamble can be amended, how can it be amended? Just now I told you that in *Keshavanandabhari*, Supreme Court said it can be amended. But since preamble is also the basic structure and you know the law on basic structure is that parliament has the emending power to amend any provision of the constitution but it cannot amend what is called basic structure of the constitution. So parliament does not have the power to destroy the constitution. If preamble is the basic structure, can it be amended? Yes, because you can add something to the preamble. So preamble can be amended only by way of addition. Accordingly, in 1976 through the 42nd amendment, three words were added to the preamble. Socialist, secular and integrity. Now then the most crucial question preamble is important. It contains the core values of the nation. It is part of the constitution, part of the basic structure. So what use of the preamble can be made in interpreting the constitution? If the provisions of the constitution are clear, preamble cannot be used in interpreting the constitution because preamble is all of the constitution. It is not is of the constitution. Having said that, let me also say, preamble is legitimate aid in the interpretation of provisions of the constitution. If the two provisions of the constitution are contradictory or constitution is silent on any subject, we need to know what is the intent of the framers and therefore we need to look at the preamble. So preamble can be used to find the intention of the framers of the constitution. In *Indra Barubari*, 1960 judgment, Supreme Court said, a key to open the mind of the makers. What is preamble? A key to open the minds of the makers of the constitution. If we want to see what was there in mind, we should look at the preamble. Now, let us now come to what is there in the preamble. Of course, I read it to you, but now let us look at it more closely. The most vital expression which has been used in the preamble at the very beginning of the preamble is the people of India. I told you that it is the preamble which tells us the source of the authority of the constitution. So what is the source of the authority of Indian constitution, we the people of India. Each one of us is referred in the preamble. From where we borrowed this expression, we the people from the United Nations charter, from where United Nations charter borrowed it from the constitution of United States. So this in my opinion is a crucial

expression in the preamble. I told you in the second lecture that the constant assembly of India did not consist of directly elected people, but by using this expression and due to the participation of the people in successive elections under this constitution, we have endorsed this constitution. And the second vital expression in the preamble other than the we the people of India in my opinion is adopt, enact and give to ourselves this constitution. This constitution we have enacted, we have adopted, we have given to ourselves. You have to read it when I talk about sovereign because this expression indicates our autonomy, our sovereignty, our independence. Now as I look more closely to the preamble, preamble is talking of three kinds of things. One, it describes our nation. What kind of nation we are? Two, it talks of three entitlements of citizens. What are the entitlements of citizens? And then these entitlements have a purpose. What is that purpose? For what these entitlements are to be used? Let us talk of these three vital things in the preamble. First, how the preamble describes our nation? It says that we are a sovereign nation, socialist nation, secular democratic and republic. So it describes our nation as a sovereign, socialist, secular, democratic republic. In terms of nation, these are our characteristics. We are sovereign, we are socialist, we are secular, we are democratic, we are republic. Then it talks of three entitlements of citizens. What are those entitlements? Very crucial important entitlements. One justice, what kind of justice? Social, economic and political. To liberty, liberty of what, of thought, belief, faith and worship. And thirdly, talks of equality as an entitlement, equality of status and of opportunity. It talks of both kinds of equalities. And then the three purposes, why we are talking of all this? Because we want to promote among the people of India fraternity. This is one word which has not been talked about in public domain. I think this is the most crucial word. The purpose of our constitution is to achieve fraternity, brotherhood and sisterhood. We all want to live in peace with each other. And the purpose of this entitlement is dignity of the individual. So, the preamble says that we will promote among the people of India fraternity and half fraternity will be promoted when we assure dignity of every individual. Each individual is important to us. Each Indian is important for us. We will not compromise on the dignity of even one citizen of ours. And if we have fraternity and if we uphold and assure the dignity of the individual, what will happen? We will achieve our ultimate goal. All of us exist for India, for our motherland. So, we will get unity and integrity of nation. If each individual's dignity is assured, if fraternity is there, if liberty is there, equality is there, justice is there, we will be a powerful united integrated nation. Great ideas, great vision. But as I said, preamble talks of odds, what ought to be done? What is really done? We need to look at the express provisions of the constitution. Therefore, let us see how preamble is reflected in the provisions of the constitution. Look at fundamental rights. All these fundamental rights are about liberty, equality, dignity of individual. Our fundamental rights

are largely individualistic, except right to culture and right of the minorities which are group rights or collective rights. We talked of social, economic and political justice. Elections happen. Everyone has a universal franchise. So, largely there is political justice. But to have social and economic justice, we have part four of the constitution, directive principles. These are the positive obligations of the state. How can we achieve fraternity? Not by mere assertion of rights, but also performance of our duties. If we have compassion for all living creatures, if we abjure violence, if we uphold the noble ideals of our freedom struggle, we will achieve fraternity. So, fundamental duties incorporate the idea of fraternity. We have unequals in our society. There are people who have been historically marginalized and exploited. How do we bring these unequals at the level of equals? Therefore, we need affirmative action. We need reservation policies. And therefore, when we have one value of justice and other value of equality, our affirmative action says, let us give primacy to justice over equality. And therefore, we have affirmative action and reservation policies. And to see that these reservation policies are properly implemented and monitored, we have schedule castes, we have schedule tribes, we have OBC commissions. And finally, the central goal of any constitution or any preamble is to have constitutionalism. Constitutionalism is an idea of limited government. There should not be any concentration of power in anybody's hands. So, you have distribution of power between center and state. You have separation of powers between legislature, executive and judicial. You have power of judicial review to see that all organs of the state are operating within their allotted spheres. Let us now come to the description of our nation, sovereign, secular, socialist, democratic republic. Very briefly, what is this whole idea of words, sovereign, sovereignty? When we say we are a sovereign nation, what does it mean? It means India is internally supreme and externally free. We don't take orders from European Union, United States or any other power of the world. We are masters of our own destiny. Whatever laws we want to make, we will make. Nobody can tell us, make this law and don't make that law. Secular. We are secular but not like France. Where religion and states are completely separated. Not like United States, where you have a Jefferson wall of separation between church and state. We have our own brand of secularism. State is religion neutral but it has equal respect for all religions. It maintains equidistance from all religions. We are socialist, not in the sense of socialism, of Lenin socialism of Karl Marx. We are socialist because we are talking of distributive justice. We are talking of social and economic justice. We are socialist because we want that the national resources should be so distributed that they subservue the common good. There is no concentration of wealth in few hands. So, our socialism is democratic socialism. We have a mixed economy. So, public sector is also there. Private sector is also there. After the adoption of new economic policies of liberalization and privatization, many people went to

the supreme court saying that now your policies are again socialism and therefore what socialist should be dropped. Supreme court said since preamble is the basic structure nothing from the basic structure can be deleted or dropped. We are a democratic nation. What does it mean? We have a government by choice. People rule over us with our consent. We gave our consent to Prime Minister Narendra Modi Ji in 2014, renewed our consent in 2019. That's why he will rule over India. Number of times people of India due to the non-performance of governments have withdrawn their consent. We are world's largest democracy. We always have peaceful transition of governments. So, will of people prevails in this country and we are republic because our president is an elected head of the state. He is not a monarch, he is not a king. He is a tenure of five years. What did we learn today? We learned that preamble talks of goals, values and aspirations of a nation. Preamble in India is part of the constitution and can be amended by way of addition. It can be used in interpretation of the constitution to know the intention of framers of the constitution. Thank you very much.

Chapter 4 - Lecture 4

Lecturer: Prof. (Dr.) Faizan Mustafa

Namaskar, welcome to yet another lecture of online course on Indian Constitution, which is sponsored by Ministry of Law and Justice, Government of India, and is conducted by Nal sir University of Law, Hyderabad. Today we are going to talk about citizenship in India. Who is an Indian citizen? How citizenship is acquired? How citizenship is lost? What have been the amendments to the citizenship act? Now first of all we must understand why citizenship is so important. So citizenship is legal membership of nation states. For citizen the context is always outsiders, alien, enemy, migrant, illegal migrant, refugee. So it is always in the context of others, we talk of citizenship. Citizenship is promise of equality and integration within a political community. Now how political community as such of which citizenship indicates membership comes into being when people agree to live together within a framework of mutually agreed rules, consenting to a sovereign political authority. Now let us try to understand what are these mutually agreed rules and what does political authority mean? The mutually agreed rules in modern times refer to constitutions. It is a constitution which reflects the mutually agreed rules and that is why it is called a sacred covenant. It is called a social contract. We discussed it in our first lecture. The political authority means power to enforce these rules. Now what are the legal implications of citizenship? Idea of citizenship goes beyond mere formal or legal membership in terms of belonging, quote unquote belonging. Idea of citizenship talks of non-discrimination. That is why article 15 says states shall not discriminate against any citizen only on grounds of religion, race, caste, sex, birth of birth. So state cannot discriminate on these prohibited grounds against any citizen. This is the formal idea of equality but the substantive idea of equality may require a special treatment. So we have a special treatment for women, for several other underprivileged sections of our population. What are the two central principles of citizenship? Citizenship is based on one of these principles. The first principle is called the universal principle, the broader concept just solely which means right to citizenship associated with soil or place of birth. So if someone has taken a birth in some country he is entitled to citizenship of that country. The narrower concept of citizenship is called just sanguini and it means citizenship emerging from blood ties. So you will not emphasize mere birth, you would also look at the blood relationship. Now who is an Indian citizen as per Indian constitution? You will be surprised from citizen has not been defined either in the constitution of India or in the citizenship act of 1955. There was lot of debate, intense debate in the constituent assembly on the question of who should be given Indian citizenship. Dr. Bhimra Ambedkar said no other subject has given this much

headache to the drafting committee as citizenship. Several drafts were prepared and destroyed. There was a suggestion that we give citizenship on the basis of religion, it was rejected. Now citizenship as a subject unfortunately is not taught in law colleges and in national law universities. It is only recently that there is a renewed interest in the subject of citizenship. Part two of the constitution of India deals with citizenship. Articles five to eleven provide for citizenship various kinds of citizenship and interestingly while the constitution of India we told you came into force on 26 January 1950. The citizenship articles came into force immediately on the adoption of the constitution on November 26 1949 that is the constitution day. Now who is an Indian citizen and how article five deals with it? So article five tells us who was an Indian citizen on the commencement of the constitution. On January 26, 1950 who are the persons who were Indian citizen and it says every person who has domicile that means he lives in the territory of India and who was born in India will be an Indian citizen. So if you are residing in India on 26 January 1950 and you were born in India you are an Indian citizen but it went further and it said either of whose parents was born in the territory of India. So maybe you are not born but either of your parents were born in India then you would also get Indian citizenship or who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement that is 26 January 1950. So if for five years you were living in India you shall be an Indian citizen. Now article six is a very important article because you need to understand that we got independence but we also got partition in the name of religion it was based on a flawed two nation theory and it involved migration of millions of peoples. It was a human tragedy of a very great magnitude. So article six is talking of citizenship of people who migrated to India from Pakistan. It says any person who migrated to India from Pakistan shall be deemed to be a citizen of India if he or either of his parents or any of his grand parents was born in India as defined by the government of India act 1935. In terms of territories we would look at government of India act 1935 and that's why in our conversation about evolution of the constitution we paid so much of attention on the government of India act 1935 because it is important even for the purposes of citizenship of people who migrated to India from Pakistan. So any person who migrated to India from Pakistan shall be deemed to be a citizen of India if he or either of his parents or any of his grand parents was born in India this is important when in article five we talked about we talked of parents here we are going one step ahead even if grand parent one of the grand parent was born in India for those who migrated from Pakistan will get Indian citizenship. Similarly if such a person who saw migrated before the 19 July 1948 and has been the ordinarily resident of India shall be deemed to be an Indian citizen these dates are important as you will see in subsequent articles. So any person who was living in the territories

which became Pakistan if they migrated to the territories which became India before 19 July 1948 and is living in India he will be treated as an Indian citizen now for those who migrated after 19 July 1948 there was a difference they had to be registered as a citizen if anyone from Pakistan migrated to India before 19 July 1948 he shall be deemed to be Indian citizen without registration but if someone came to India after 19 July 1948 then what he has to do he has to register himself as an Indian citizen with a special officer appointed by the government for this purpose. Now there is another provision in this article which says but no person is to be registered unless he has been resident in the territory of India for at least six months immediately preceding the date of application. So if you want to be Indian citizen you migrated to India after 19 July 1948 you can apply if you have been in India for six months at the time of making an application for your registration. Then article seven talks of citizenship of migrants to Pakistan this whole partition business it has created all kinds of problems for Indian nation. So notwithstanding anything in article five and six we are not talking of people who are born in India or whose parents are born in India we are not talking of people who migrated from Pakistan to India. Now we are talking of people who went from India to Pakistan and then returned back. Look at the problem many people they either got stuck because India and Pakistan were one country there were suddenly partition and there were partition rights there were traders there were merchants there were people who had their relatives in that part of the country and they could not return. So now subsequently when they return how their citizenship is to be determined. Article seven tells us that a person who has after first March 1947 migrated from India to Pakistan shall not be deemed to be Indian citizen anyone who went from India to Pakistan after first March 1947 now the partition will come in August we are talking of first March 1947 and we are saying such a person shall not be deemed to be an Indian citizen but there is a room for a different kind of a person this provision shall not apply to a person who after having migrated to Pakistan has returned to India and how he has returned he has returned under what was called a permit of resettlement or permanent return now these permits were issued after lot of inquiries by our embassy by the district officials to which that person belong and then that person will be allowed to return to India and shall be deemed to have migrated to India after 19 July 1948 even if he came before that why because if we deemed him to have migrated before 19 July 1948 automatically he is deemed as citizen but we do not want this benefit to give to him therefore we said you shall be deemed to have migrated to India after 19 July 1948 and therefore now to get Indian citizenship you have to get Rajashtra so registration was necessary for people who went from India to Pakistan and then return many people did not have idea about what kind of partition it would be and therefore once they realize that a new country has been born they thought their country and their motherland

is India and therefore they return and many as I told you were traders or many merchants or people who are just visiting their relatives who return like this then article 8 talks of citizenship of people who are living outside India so any person who or either of whose parents or any of whose grand parents was born in India that is Indian territory as defined by the government of India at 1935 and who is ordinarily residing in any country outside India he shall be deemed to be an Indian citizen if he has registered with Indian diplomatic or councillor representative in that country you know there were many people who are outside India at the time of commencement of the constitution how do we give our citizenship to them they will go to our embassy or they will go to our councillor services and register themselves as Indian citizens then you may lose your citizenship article 9 if you have voluntarily acquired citizenship of a foreign country then you will lose your citizenship many people who have migrated to USA or several other countries they acquire citizenship of those countries and consequently they lose Indian citizenship then article 11 gives power to the parliament to regulate citizenship this is an important provision the constitution of India is talking of citizenship on the commencement of the constitution subsequently how citizenship will be given that power was given to the parliament of India because we have single citizenship so on the question of acquisition and termination of citizenship and all matters relating to citizenship article 11 gives complete powers to the parliament moreover entry number 17 of the union list has citizenship as a central subject therefore nobody has a power to pass any law in respect of citizenship except parliament and exercising this power parliament pass the citizenship act in 1955 this act has been amended number of times prominently in 1986 in 2003 in 2015 and recently in 2019 now many states have passed resolutions against the CAA 2019 now these resolutions legally speaking don't have any value because state assemblies do not have any power in respect of this in respect of citizenship the critics of this bill say that this bill is discriminatory on the basis of religion the government's argument is that they are making people eligible for citizenship if they have phased religious persecution in Pakistan Afghanistan and Bangladesh so what did we learn today we learned about citizenship we know citizenship is a state-centric concept citizenship is relationship of individuals with a state with a nation-state citizenship is a bundle of rights citizenship can either be based on birth or it can be based on blood ties who is an Indian citizen we will meet soon for the next lecture in the next lecture we are going to talk about right to equality which is one of the most important fundamental rights we would talk about formal equality substantive equality we will talk about two expressions equality before law and equal protection of law and from where we have borrowed these two concepts we will also talk about article 15 which is article about non-discrimination it prohibits state from discriminating only on the basis of religion race caste sex place of birth etc we would also talk about

a abolition of untouchability and abolition of titles thank you very much dana

Chapter 5 - Lecture 5

Lecturer: Prof. (Dr.) Faizan Mustafa

Namaskar, welcome to online course on Constitution of India which is being offered by Nalsari University of Law in collaboration with Ministry of Law and Justice Government of India. Today we are going to talk about a very important fundamental right that is right to equality. Now first of all we should understand why fundamental rights as such are important. So fundamental rights, human rights, basic rights, natural rights, civil and political rights, these are the various names which are given to these important rights. We must understand all fundamental rights are human rights but all human rights are not fundamental rights. Only some of the human rights have been incorporated in part three of Indian Constitution as fundamental rights. Some other human rights will find a place in the directive principles of state policy. Now fundamental rights also incorporate what we already discussed in our lecture on preamble, ideas of liberty, equality, fraternity, justice and above all dignity of the individual. Fundamental rights also serve the goal of constitutionalism in terms of putting negative restrictions on the powers of the state. Now part three of Indian Constitution which deals with fundamental rights starts with the definition of a state in article 12. Why state is the primary address of fundamental rights? Because of the enormous powers which state enjoys, state is in the best position to violate rights. And that's why generally state is addressed that state shall not deny liberty, state shall not deny equality. Let us come to article 12 and understand what is the meaning of the state. State under article 12 means government of India and parliament of India, government and legislatures of each state and local or other authorities within the territories of India or under the control of government of India. What are the examples of local authorities, municipalities, panchayats, recently you had elections in the union territory of Jammu and Kashmir on DDC. Now this is also a local authority. In terms of other authorities, a lot of jurisprudence developed, number of judgments were given by the Supreme Court but let us say O and G.C. was held to be a state. Life insurance corporation L.I.C. was held to be a state but judiciary is not a state. Therefore, if judges are giving judgments, you cannot challenge them as a relative of fundamental rights. But if judiciary is acting in the administrative position, then they can be a state. Political parties are not a state and Supreme Court is strangely held, B.C.C.I. is not a state. Now, let us go to article 13, very important article. Of course, Supreme Court Justice Patanjali Shastri had said that article 13 was included in the Constitution out of abundant caution. Even if that article is not there, you cannot make any law which is violating of fundamental rights. So, article 13 says all the pre-constitution laws so far they are inconsistent in the fundamental rights on the commencement of

the Constitution that is 26 January 1950, they become void to the extent of inconsistency. You know, you have number of pre-constitution laws, Indian contract, transfer of property, sale of goods, partnership, civil procedure code, Indian penal code, all these laws are to be tested today on the touchstone of fundamental rights. For future article 13 clause 2 says no law can be made which contravenes fundamental rights. There are three doctrines which we must understand. One is doctrine of eclipse. Now, what is this doctrine of eclipse? You must have heard of lunar eclipse, solar eclipse. Eclipse means overshadowing. When you don't see sun or you don't see moon, that does not mean moon or sun does not exist. They exist, but some other body overshadows them. So, now fundamental rights overshadow all the laws. And therefore, if some law is violating of fundamental rights, doctrine of eclipse comes into picture. If the problem in that law, the violation in that law is removed, then the law will be revived. Doctrine of severability. If a law is passed which has 100 sections, only one section is violated of fundamental rights. So, this section will be severed from rest of the section and only this section will be struck down as null and void by the courts. Then we must understand fundamental rights being natural rights, basic rights every human being is born with those rights are not subject to waiver. No citizen, nobody has a right to say, I have waived my right, no one can waive his right. Let us see what are our fundamental rights. So, you have right to equality from article 14 to 18, right to freedom from articles 19 to 22, right against exploitation, article 23 and 24, right to freedom of religion, articles 25 to 28, cultural and educational rights, article 29 and 30, by the 44th amendment in 1978, right to property was deleted as a fundamental right. That does not mean today anyone can take away somebody's else's property. It is not a fundamental right, but it remains a legal right. And after the 44th amendment of the constitution rights given in article 20 and rights given in article 21 are now non-derogable rights. Therefore, even during emergency, these rights cannot be suspended. Now, look at the framers of our constitution. When they drafted fundamental rights, they showed their vision of India. And the vision of my great country is there are rights which we give only to our citizens. So, rights given in article 15, 19, 29 are rights of only our citizens. So, our citizens have a right for instance to non-discrimination. State and article 15 cannot discriminate against any citizen on grounds only of religion raised caste, sex, place of birth. Similarly, freedom of speech and expression, right to reside and settle anywhere in India, right to form associations or unions. These are the rights given in article 19 only to the citizen. Similarly, right to conserve culture is a right of citizens. Then there are rights which we have given to all natural persons including foreigners. So, rights under article 20, article 21, article 25 are given even to foreigners. Any foreigner on our soil will also have freedom of religion. Any foreigner on our soil will also have right to life and right to personal liberty. Similarly,

there are rights which we give not only to natural persons but also artificial persons. What are artificial persons? Juristic persons. In law, there is a fiction that a company is also a person. So, a company is also entitled to rights under article 14 which is right to equality. Now, come to right to equality which is article 14 and as I said fundamental rights basically are addressed to the state. So, article 14 says, state shall not deny and then it says to any person which includes even a juristic person, even a company, even an idol. Equality before law. An equal protection of laws within the territory of India. Two expressions are used. Equality before law, this has been borrowed from British concept of rule of law. Equal protection of laws, very important expression has been borrowed from the 14th amendment of United States Constitution. Both these expressions are there in article 7 of universal declaration of human rights, 1948 which was adopted by the general assembly while we were drafting our Constitution. So, probably we picked it up from article 7 of universal declaration of human rights. Now, in equality before law, this term law is used in generic or philosophical sense. But when we come to equal protection of laws, then it is in the context of specific laws. And now courts have held that right to equality is the part of basic structure of the Constitution and therefore, this right can never be deleted. Equality, word when I use, you may think everyone is to be given a same treatment. No, that is not the idea of equality. Equality does not mean same or equal or uniform treatment for all. Equality does not mean everyone will be treated equally. So, unequals are not to be treated equally. Equals are to be treated equally. People who are circumstance in similar manner will be similarly treated. Therefore, classification is permissible. Law within the class will be same. Likes will be treated alike. So, this classification is permissible. Why classification is permissible? Because you will say there will be one law for this class and another law for other classes. So, there can be a law even against one individual or law against one company. If that company or that individual constitutes a class in himself or itself. How do we test the validity whether the classification which has been made is good classification, a legitimate classification. We have to look at three things. One, the classification must be reasonable. It must be based on intelligible differential. People who are picked up and people who are left out. There are intelligible differences between them. You cannot say we are making a law for people who have black hairs and people who have golden hairs will not be covered by this law. This kind of classification is not reasonable classification. You cannot say we will pass one law for tall people and another law for short people. This kind of classification is not permissible. Then this classification which is reasonable which is based on intelligible differential must have a rational and lawful object to achieve. Let me give you an example. Section 11 of the Indian contract says minor cannot enter into a contract. Now if a minor who is an Indian citizen, he says how come law does not

allow me to enter into a contract. This classification based on age is not correct. The classification is right because minors do not have the same kind of maturity as compared to majors or adults. So classification is reasonable. And then this classification is based on intelligible differential between adults and minors. And it has a rational object to achieve. What is the object to achieve? Minors should not be forced by adults to enter into contracts against their own interest. Minors will not be able to understand all the implications of the contractual liabilities they are undertaking. And therefore law says a minor's contract is void. And this classification is reasonable. It has a rational object to achieve and it is based on intelligible differential. Therefore it is a valid classification. Now let us move further in this classification. When you are making classification law is based on common sense. So it does not expect that the classification should be based on mathematical nicety or should be scientifically perfect or logically complete. That is not the demand of law or demand of article 14. Article 14 does not say that there must be identical treatment. And then our law says if parliament or state legislature passes a law there shall be a presumption of constitutionality of law. And anyone who challenges that law he has the burden to prove that the law is unconstitutional. So if say citizenship amendment act is challenged the burden of proof will be on the petitioner. The court will start with this that this law is constitutionally valid because there is a presumption that parliament knows constitution. And it is not expected to pass any law contrary to the constitutional provisions. Now let us look at some of the examples of classification. Let us first take what are valid classification. Taking over the management of a company there was a law passed against one company which was involved in the production of an essential commodity and the court said this law is valid. There are laws which have been passed over the decades to set up special courts for special crimes. This classification is valid. There is a law which says non-resident Indians NRIs will pay higher fee. Now this classification between Indians and NRIs is a valid classification. Let us look at some of the bad classifications. There was a law which provided for district wise reservation that for this district this much reservation will be there. It was a shutdown. Similarly Christian for instance if a Christian is making a will then the will must be made 12 months before his death. Now this kind of law is not there for other communities. The law of will is very clear. Whatever is the last will before death will be taken as the valid will and therefore court is stuck it down. Or the reservation for the people of hills was not accepted as a reasonable classification. Now Supreme Court has liberalized the doctrine of equality and Supreme Court has said equality is a dynamic concept and cannot be crypt cabined and confined within the traditional and doctrine of the limits. And therefore now it is not enough that a classification is reasonable. It is based on intelligible definition. It has a rational object to achieve. There is a fourth condition. It must not be arbitrary. Triple divorce was struck down by

the Supreme Court because it was found to be arbitrary. Now let us go to some of the prohibitions which are there in Article 15 which is a facet of right to equality. Again it is addressed to the state. The state shall not discriminate against any citizen on grounds only of religion. Race, caste, sex, place of birth. The crucial word is only. There cannot be a discrimination on the sole basis of religion, race, caste, sex, place of birth. And then Article 15 says, no citizen on grounds of religion, race, caste, sex, place of birth shall be subject to any disability, liability or restriction. With regard to access to shops, public restaurants, hotels, places of public entertainment, use of wealth, tanks, bathing arts, roads and public resorts, maintain wholly or partly out of state funds but dedicated to use of general public. When I tell you about Article 17, you will know the historical context of untouchability. Article 15 is addressing that. All public restaurants, public shops, roads, they are for everyone and therefore there cannot be any discrimination. Let us look at other provisions of equality. There is one formal equality and there is one substantive equality. Say if there are two people and four breads and if you give two breads to one person, two breads to another person, it will be Aristotolian former equality. But one person may not need two, he for him one bread is enough and the other person may be very hungry or has a greater appetite, he needs three. So if you give two breads to one person, one bread is getting wasted because one person wants only one. If you give to the other person only two who wants three, he still remains hungry and that is why classification. Therefore substantive equality requires taking into account distinctions, differences and therefore Article 15, clause 3 says that state can make special provision for women and children. And then in Article 15, clause 4 and Article 15, clause 5, if state is permitted to make special provision for the advancement of any socially and educationally backward classes of citizens or schedule caste and schedule trial. In 2019 by 100 and third constitutional amendment, another clause was inserted, Article 15, clause 6 which now provides for the first time in our constitutional history a provision for the advancement of any economically weaker sections which are not covered by clause 4 and clause 5. So people who are economically weaker for them also state can make a special provision and the government has made a special provision of 10% reservation for them. Now let us come to other provisions of equality. Article 16 talks of equality of opportunity in matters of public employment which we will discuss at length in the next lecture when we talk about reservation policy. Come to Article 17, it is talking about untouchability in inverted commas. Why? Because this is not a mere word, it has a context, a historical context. And it also shows Article 14 which talks of equality or 15 which prohibits discrimination on certain grounds may not be enough to remove untouchability. And therefore, Article 17 says untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arriving out of untouchability shall be an

offense punishable in accordance with law. Historically, certain sections of people have been discriminated and therefore, you needed a special article for it. Similarly, in Article 25, the birth of temples have been opened for everyone. Then in 1955, as per Article 17, that it will be a punishable offense if you practice untouchability, untouchability offenses act was passed. But it was realized that it gives few and small punishments in 1976, the act was amended and was renamed as protection of civil rights act 1955. Still untouchability atrocities against schedule cast and schedule tribes continued. Therefore, Parliament in 1989 enacted what is called, schedule cast and schedule tribes prevention of atrocities act, SCST act. In 2018, Parliament had to amend this act because Supreme Court gave a decision by which Supreme Court said, an FIR will not be registered under this act without preliminary inquiry. Permission is required for arresting a person, Parliament overruled the Supreme Court judgment by amending the act and subsequently Supreme Court also recalled its erroneous judgment. Now come to Article 18 which is also part of right to equality. In the olden days, somebody was called Raja, Rai Sahab, Maharaja, Sir. Now this is gone. Article 18 says, no title, not being a military or a academic distinction shall be conferred by the state. You can have an academic title. So I am a doctor because I did PhD. If you go to military, you can get military titles and honors. And then Article 18 says, no citizen to accept any title from any foreign state. But unlike Article 17, if you indulge in untouchability, you will be punished under protection of civil rights act or a SCST act. For Article 18, if you accept a title from a foreign state, you will not be punished. There is no law which makes it punishable. In 1954, government of India introduced four awards, Padamshiri, Padambhushan, Padambhushan and Bharatratna. These awards were abolished by the Janta government in 1977. But when Mrs. Gandhi came back to power in 1980, they were reintroduced. Supreme Court upheld these awards by saying that they are not the titles which Article 18 prohibits. But the court said that these titles or awards cannot be added as suffix or prefix names. What did we learn today? We learned that fundamental rights are negative restrictions on the power of a state. Right to equality is based on the British concept of rule of law, an American concept of right to equality given in amendment 14 of US Constitution. Equality does not mean uniformity that everyone is to be treated equally. It means likes are to be treated alike. Reasonable classification is permissible if it is not arbitrary and it has rational object. In the next lecture, we will talk about reservation policy, very important subject. Why reservation policy was adopted? How it has worked? What improvements can be made in our reservation policy? Thank you very much, Danevad.

Chapter 6 - Lecture 6

Lecturer: Prof. (Dr.) Faizan Mustafa

Namashkar, welcome to online course on Indian Constitution run by Nalsari University of law and is sponsored by Ministry of Law and Justice Government of India. We have already talked about right to equality. Today we are going to specifically talk about a very important subject, reservation policies and Indian constitution. Now, what is the history of reservations? Now, if you look at the history of reservations, you will find that reservation policies were introduced by some of the princely states and then they were introduced by the Bhattesh. So Tamil Brahmins had the first mover advantage in terms of their knowledge of English, though they were just 3% but they occupied about 80% of jobs in the Mysore princely state. As a result, Kanna Brahmins had an extremely low representation in public services. They were protests, they were concerns about the low representation of Kanna Brahmins accordingly in 1918 the Maharaja of Mysore appointed a committee under the chairmanship of Chief Justice Miller to investigate and report on the situation and suggest measures to provide a adequate representation of depressed classes. At that time, the term used was depressed classes. Thus, if you see this, that it is the Kanna Brahmins who are initially flagging the issue of their low representation and therefore, they contributed to the adoption of policy of reservation. Now, if you look further, you will find in 1921, preferential recruitment for backward communities was instituted formally for the first time in colleges and state services of Mysore. In 1921, reservation of government jobs for non-Brahms was introduced for the first time by the Prince of Mysore, Krishnrajay Vedyia. Then, princely states of Kola, Pur and Baroda also followed reservation policies and subsequently reservation policy would be adopted by Madras presidency. So, since Maharaja of Mysore introduced some reforms with a view of giving larger share to Kanna Brahmins, Vokalingas and Lingayas besides the untouchable caste and Muslims and due to this reservation, there was a anti-Brahmin movement in Tamil Nadu and also, drumming Kanna started demanding special quotas and conceding their demand, the Madras presidency granted reservation in government jobs and educational institutions. So, it is clear to you that there was a demand from Kanna Brahmins. Then, reservation is given to Brahmins, Vokalingas, Lingayas, Untouchables, Muslims. So, there was a counter-reaction in Tamil Nadu and due to this counter-reaction and anti-Brahmin movement, Madras presidency had to concede and adopt policy of reservation. Then, one of the biggest mile stone in the modern Indian history on the whole question of reservation would come from B.R. Ambedkar's who was now leading depressed classes movement and they demanded representation and reservation accordingly Puna Pact was signed in

1932. Interestingly, Gandhi Ji himself did not sign Puna agreement and it was signed by Madhan Mohan Malviya who you know is also founder of Banaras in the university as the representative of caste Hindus. Now, what did Puna Pact provide? Puna Pact provided for the increase in number of reserve seats from 78 to 148 as well as a adequate representation for a depressed cast in the central legislature as well as provincial legislature. Puna Pact was subsequently incorporated in the Indian constitution and reservation in parliament and assemblies was initially provided for 10 years and subsequently it has been extended. Now, subsequently, Ambedkar became member of Voice Royes executive council and on his proposal for the first time 8.5% seats in central services were for the schedule class. So, there is one reservation in assembly which had a time frame and there is another reservation which is in jobs which does not have any time frame. What are the goals of reservations? What Ambedkar was demanding? What Kanna Brahmin's were demanding? Representation. So, our society is diverse, it is good if society's diversity is reflected in the public institutions. This is the reason which is adopted even in United States and diversity is considered as legitimate consideration in the admissions in higher education. There is no reservation policy so to say like us but diversity will be taken into account in admissions. The goal of reservation policy is to have an egalitarian society. The purpose is to bring unequals at the level of equals. Reservation promotes substantive equality rather than mayor formal equality. We had discussed that in the last session. Now, what are the relevant constitutional provisions on reservation? We just discussed that to correct historical wrongs of denial of equality to certain sections of our population, our constitution not only promised just social, economic and political and equality of stage does an opportunity in the preamble. We discussed this in the preamble lecture. But our constitution also incorporated equality in articles 14 to 18, it abolished untouchability in article 17, it favored opening of doors of Hindu temples for all sections of Hindu in article 25 and then constitution, indirective principles created a positive obligation on the state. Article 46 says, state shall promote with special care the educational and economic interest of weaker sections of the people. A wider term is used that a state will take a special care of educational and economic interest of weaker sections. And then this article says, in particular of schedule costs and schedule tribes and shall protect them from social injustice and all forms of exploitation. We had discussed in the last lecture that is how SCSD act of protection of civil rights act were enacted. Then article 35 of the constitution clearly lays down that the claims, this is a crucial word, put it in inverted commas, claims of the members of the schedule costs and schedule tribes shall be taken into consideration consistently with the maintenance of efficiency of administration in making of appointments to services and posts. So whenever a state is making appointment it will consider the claims of members of SCs and STs but these claims must remain

consistent with the maintenance of efficiency of administration. Then we have created number of constitutional bodies to monitor matters and safeguard relating to SCs and STs and BCs to inquire into specific complaints with respect to deprivation of rights of SCs and STs and backward classes. So we have a National Schedule Class Commission, article 338. We have National Schedule Tribe Commission, Article 338A. We have a National Backward Class Commission recently established by Article 338B when 100 and second constitutional amendment was inserted in the constitution. Who are SCs and who are STs? There is no caste in India which is called SC or there is no tribe in India which is called ST but this is an umbrella term. SCs includes number of caste and STs includes number of tribes. So term schedule caste was used in Government of India Act 1935. That is why in one of the earlier lectures I had said Government of India Act 1935 is very important that is why we are discussing it in details. These are the very same caste which were earlier called Dipres classes. I refer to Puna Pact and I am Baitkar being the leader of Dipres classes. What were earlier called Dipres classes? They are now becoming Schedule Class, Closes 24 and 25 of Article 366, Defined Schedule Caste and Schedule Tribes and it is the President of India who will define through a presidential order what caste are to be included in these two categories. Now initially only members of the Schedule Caste professing Hinduism and four caste among six Kabir Pantheos, Randasi, Sikleegers and Masabees were included in the list. In 1956 this benefit was extended to include all Schedule Caste professing Sikhism. In 1990, Schedule Caste professing Buddhism were also included among the Schedule Caste. So, a Schedule Caste person must profess Hinduism but people of other religions can be included in the category of Schedule Tribes. Subsequently OBC reservation was also provided when Mandal Commission was implemented. Then in 2019, economically backward classes were also given reservation. Who are backward classes of citizens? Constitution gives no definition of backward class of citizens. Article 340 talked of Commission to investigate conditions of socially and educationally backward classes. The first Commission was appointed under Kaka Kalekar in 1953 and second Commission was headed by BP Mandal 1981 Commission. Now it was BP Mandal Commission which recommended 27% OBC reservation that was implemented by VPC government in 1990. So, who are backward classes of citizens? I just told you there is no clarity how to define a backward class if you look at Supreme Court judgments. In MR Balaji versus State of Masur, Supreme Court said caste is not the sole factor to determine backwardness. In the state of AP versus Balaram, Supreme Court said a caste can also be class that a caste as such may be socially and educationally backward. In a 1985 judgment of Kasi Vasanth Kumar, Supreme Court said backward classes should be comparable to Shedule caste and Shedule tribes in backwardness. And then the leading judgment, a 9 judge ben judgment of

Supreme Court in Indra Swani versus Union of India, where Supreme Court said class here is not to be under restute in the Marxist sense. Backward class as a term is wider than socially and educationally backward class. And the court also said economic criterion alone cannot be the basis of backwardness. And the Supreme Court also said when we are providing reservations to backward classes, creamy layer is to be excluded. As you look at the judicial response to reservations, I think it is important that I take you to the very first case because it was a landmark case, it led to a constitutional amendment. So, we had in the history of reservations, discuss the reservation provided in the Madras' Presidency. So, there was a communal order of the government which prescribed the ratio by which government jobs were reserved for Brahmins, non-Brahms, Muslims, Anglo-Indians and Christians. So, there was reservation for almost everyone. It was implemented in 1927 and it was this GEO, which was challenged in the historic case of Champakam Durai Rajan, in less than a year and a half of the commencement of our constitution, not one or two, but as many as three judges, three of Madras High Court and seven of Supreme Court is stuck down reservation in educational institutions. Reservation in jobs is an enabling provision provided in Article 16, clause 4, but whether we can have reservation in educational institutions, in the admissions, there was no provision at that point of time and therefore, what happened after losing this legal battle, government brought in the first constitutional amendment to overturn this judgment. Interestingly, if you look at the facts of the case, Durai Rajan, who had done BA from Madras University and was keen to join MBBS, had not even applied for the course. Her grievance was merely speculative that since there is reservation, I may not get a seat. Though she was a Brahmin and there was a reservation for Brahmins as well. The simple argument was that communal GEO violated fundamental rights, provisions of articles 15 clause 1 and article 29 clause 2 that prohibit any discrimination only on the basis of caste, religion, sex, place of birth, language, etc. Government tried to justify its reservation policy on the basis of article 46, which we just discussed, which is a directive principle. The three judges in Madras High Court authored three opinions, they were unanimous in striking down reservation, but they gave different reasons. State immediately went in appeal to Supreme Court in Supreme Court seven judges, led by Chief Justice H. J. Karnia, heard the matter and again struck down this policy. Supreme Court also rejected the argument, central government's argument that this policy is legal because of article 46. On the simple logic, the directive principles are not enforceable and cannot prevail over fundamental rights. We will discuss the distinction between directive principles and fundamental rights in some other lecture. The court said it in explicit terms that directive principles had to confirm to and run subsidiary to the chapter of fundamental rights. What was government's response? They were protested in southern states as a

result of this judgment and accordingly constitution was amended. An in article 15 clause four was inserted. What did it say? Nothing in article 15 or in clause two of article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the schedule class and schedule tribes. It is this provision under which subsequently all reservation policies in admissions will be framed. How much reservation can be given? What is the quantum of reservation? First of all, you should understand there is no fundamental right to reservation. What article 15 clause four or article 16 clause four provide is simply this. If a state decides to make reservation, you cannot challenge it as violation of right to equality. So reservation is an enabling provision. If a state wants it, it can give it but there is no fundamental right for any reservation. We should also understand there is a myth many people think that reservation in jobs or reservation in admissions was confined to just first and years. No. That is reservation in legislature, in parliament and in assemblies. Here we are talking of a different kind of reservation. Constitution also does not tell us upper limit of reservation but Supreme Court has laid down consistently said that ordinarily reservation should not exceed more than 50 percent. Because Supreme Court believes that to have efficiency in administration article 335 which I just read to you at least 50 percent see it should be available to general candidates. We should also understand there cannot be any reservation on religious grounds. Thus the Muslim reservation in Andhra Pradesh and a minority reservation within 27 percent OBC reservation were also struck down by the Andhra Pradesh High Court. Now how was OBC reservation in admissions implemented? A constitutional amendment was again made and a new clause was inserted clause 5 in article 15. What did it provide? Nothing in this article or sub clause G of clause 1 of article 19 shall prevent the state from making any special provision by law for the advancement of any socially and educationally backward classes of citizens or for the schedule class or the schedule tribes in so far as such special provisions relate to their admission to educational institutions. Including private educational institutions whether aided or unaided by the state other than the minority educational institutions provided in article 30. So this 93rd constitutional amendment is talking of giving another enabling power to the state to provide for reservation in admissions for any socially and educationally backward classes of citizens including private educational institutions. Central government also enacted central educational institutions reservation in admissions act 2006 which provided for 27 percent reservation in central institutions. That means central universities, IITs, IMs etc. Now here so far we were talking of reservation in admissions of schedule class, schedule tribes and backward classes those who are socially and educationally backward. In 2019 a constitutional amendment was made and clause 6 was inserted in article 15 which provided nothing in this article

or clause sub clause G of clause 1 of article 19 or clause 2 of article 29 shall prevent the state from making any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses 4 and 5. So now for the first time an economic criterion of reservation is introduced for classes other than SCs and STs and BCs and this provision also provided that this reservation will be in addition to existing reservation subject to maximum of 10 percent of total seats in each category. OBC reservation was 27 percent. Now this reservation for economically backward classes upper limit is 10 percent. Can reservation be given in promotions? With the brief answer is yes as the law stands today. Now reservation in promotions for SCs and STs was introduced in April 1978 for the class 1 jobs. Indian courts did not favorably consider reservation in promotion they favored reservation in the initial appointment. Thus in CA Rajindran, Supreme Court was considering a 1963 notification of the government providing there shall be no reservation in promotions for class 1 and class 2 positions. A 5 judge bench headed by CJA K&1 Chu upheld this policy that there will be no reservation for class 1 and class 2. In 1992 a 9 judge bench which looked basically the Mandal Commission reservation OBC reservation again said that in future there will be no reservation in promotions. But ultimately in 2000 a constitutional amendment was made reservation in promotion was brought back. In 2006 in M Nagraj's judgment Supreme Court said state is not bound to provide for reservation in promotions. But if it wants to do so it must meet the requirement of collection of quantifiable data on three facets one backwardness of the class two in adequacy of representation and three general efficiency of services not affected. So if you want to give reservation to SCs and STs or others in promotions collect data quantifiable data to prove that they are backward to prove that they have inadequate representation and to prove that this reservation will not adversely affect the efficiency of services. There was a huge debate on this judgment many people wanted it be reviewed a five judge bench of Supreme Court in journal thing in 2018 rejected the review but it modified P Nagraj's judgment by saying for SCs and STs there is no need to collect quantifiable data of their backwardness. The mere fact that SCs and STs are included in the presidential order will be taken as enough proof of their backwardness. So what did we learn today? Reservation is not negation of equality. It goes beyond formal equality. It promotes substantive equality. Substantive equality may require classification. Substantive equality may require differential treatment. Reservation promotes diversity. The diversity of the society must be reflected in all institutions at least the public institutions. There is no fundamental right to reservation and there is no constitutionally prescribed upper limit of reservation. In the next lecture we would talk about freedom of speech and expression. Thank you very much. Dhanneva.

Chapter 7 - Lecture 7

Lecturer: Prof. (Dr.) Faizan Mustafa

Namaskar, hello welcome to online course on Indian Constitution sponsored by Ministry of Law and Justice Government of India and offered by Nal sir University of Law. Today we are going to talk about freedom of speech and expression which is one of the most important rights in any democracy. Now why article 19 is called Charter of Liberty. Article 19 is called Charter of Liberty as it guarantees not one right but number of rights. We in previous lectures discussed right to equality. So article 14 was talking about equality and then 15 was also talking about another facet of equality. 16 was talking about another facet of equality. You have similarly article 21 which talks of personal liberty and here we are going to talk about article 19 which guarantees not one or two but as many as six rights. Now what are these rights? Freedom of speech and expression right to assemble peacefully and without arms, right to form associations or unions which after the 97th amendment now includes cooperative societies. Right to move freely throughout the territory of India, right to reside and settle in any part of territory of India, right to practice any profession or to carry on any occupation trade or business. Now fundamental rights are natural and basic rights. These rights are inherent in the status of citizens. Therefore these rights are available only to citizens. We have discussed in the previous lecture freedom of religion is available even to foreigners. Right to equality is available even to a company and a foreigner. Here we are talking of rights of only people who are Indian citizens and therefore these rights are available only to natural persons. While right to equality can be claimed even by a corporate or a company or a juristic person, article 19 rights are available only to natural persons and therefore companies and juristic persons cannot claim article 19 rights. Now we should also understand that no right can be absolute or uncontrolled. Many people in our country talk only of rights. They think rights are absolute. Rights can be curtailed. At times must be curtailed and must be restricted. Now there is a difference between American constitution and Indian constitution. In United States constitution what restrictions can be imposed on fundamental rights are not mentioned in the constitution. Judiciary has been given the right to evolve those restrictions. We did not want this kind of confusion in our constitution and therefore in the constitution itself we have stated the restrictions. Therefore article 19 clauses two to six tell us about the restrictions which can be imposed on these six fundamental rights guaranteed by article 19. Now what kind of restrictions can be imposed? Each and every restriction is not justified. Only reasonable restrictions can be imposed. From where this word reasonable has come it was not there in the original constitution. It was inserted in 1951 by the first constitutional amendment before

restriction, before word restriction in clause two of article 90. This word reasonable in a way limits the power of the state. Now state can impose only reasonable restrictions which restriction is reasonable if it satisfies the requirement of proportionality. Who has the burden to prove whether the restriction is reasonable and proportional state? Who determines the reasonableness of the restriction? This is the job of the courts. Now which fundamental right has been deleted from article 19? Six rights I just mentioned but there was a seventh right also. Article 19 clause F had guaranteed right to acquire, hold and dispose of property. By the 44th amendment in 1978 this fundamental right was deleted. Does that mean that anyone can not take away your property because right to property is not a fundamental right? The answer is no. No one can still interfere with your right to property. Right to property may not be a fundamental right but it continues to be a legal right. What is the difference? If it is a fundamental right then no law can be passed which violates a fundamental right due to article 30 which we had discussed before. So today you are entitled to acquire, entitled to have your property because you have a legal right to your property. Why freedom of speech is important? We should now discuss freedom of speech. Democracy is government by choice. If you are living in a monarchy one king is dead, another king or the prince becomes the king. The principle is king is dead, long live kingship. In a democracy we choose our leaders, we choose our rulers. So people are called upon to make several choices in a democracy. How can you make a choice if you do not know what are the various alternatives available to you? A choice is always made out of alternatives. Freedom of speech and expression paves the way for making you understand various choices. So all kinds of leaders will come and speak and then you will pick up and vote one particular leader. So if freedom of speech and expression has a purpose what is that purpose? That it helps people in making the right choice at the hustings on the voting day to make a right choice. Then freedom of speech and expression is not a license for unnecessary talk-tiveness. You are not supposed to talk nonsense under freedom of speech and expression. You have to say only such things which help people make the right choice. What are the four values which freedom of speech as a right serve? One freedom of speech assures individual self-fulfillment. If an individual is not allowed to express his emotions, his opinions, his frustrations, his happiness, he will not feel self-fulfilled. The versatile development of an individual's personality is impossible if he does not have right to express himself. Freedom of speech and expression helps us in attaining the truth. Number of people are speaking. Who is telling us the truth? If all are allowed to speak, people can make a judgment. Who is telling the truth? So if we want to attain the truth, let everyone exercise his freedom of speech and expression. Democracy is not confined just to exercising your ballot once in five years. People are sovereign. People are the ultimate masters.

Therefore, people should continue to participate in the social, political and economic decision making of the government. How do people participate by speaking, by writing, by making cartoon? Therefore, freedom of speech and expression ensures people's participation in the governance of the country. And freedom of speech and expression also helps us in maintaining the balance between stability and change in the society. Any change in the society has to come through freedom of speech and expression, through lawful means, change is good, but stability is equally good. Therefore, if we want to have a balance between change and stability, we must have freedom of speech and expression. How is free speech important for democracy? John Stuart Mill, British philosopher, British writer, great writer, has said, if all mankind minus one were of one opinion and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, that one person, then he, if he had power, would be justified in silencing mankind. So, if the entire humanity has one view and there is another person who has a contrary view, this contrary view must be expressed. People are to make choice, so every relevant fact, every opinion must be expressed. In democracy, governments work with the consent of the people. How is the consent of the people expressed through freedom of speech and expression? And therefore, the govern must exercise their right to expression of consent. Michael Joel, who is a leading American writer, has said, when men govern themselves, it is they and no one else who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones. Our government repeatedly says that everyone has a right to express his views, because all views are important, whether those views are good or those views are bad, people will decide. So, conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. To be afraid of ideas is to be unfit for self-government. Therefore, when someone is expressing views, they can express whatever views they want to express, but within the limitations of freedom of speech and expression. No one has a right to abuse or misuse freedom of speech and expression. And therefore, restrictions on freedom of speech and expression are equally important. What does freedom of speech contain? Freedom of speech means the right to express one's convictions and opinions by word of mouth, writing, printing, picture or any other mode, offline as well as online. Whether you are on WhatsApp or Twitter or Instagram, wherever you want to express yourself, you can express. Freedom of speech includes freedom of circulation. You can reach out to as big an audience as you want. In a leading case of Ramesh Thapur, versus the state of Madras, 1950, judgment of Supreme Court, banning entry of newspaper crossroads, which was published from Bombay, in Madras was held as invalid. So, this paper crossroad, it is allowed every year, but not allowed in Madras, not Chennai. The court said freedom of speech

includes right to circulation. Indirect ban of circulation, such as number of pages and size of paper was also held in valid in Sakal papers versus Union of India. We must also remember one very important fact, while freedom of press is specifically mentioned in the American constitution. There will be a lot of rights. Article 19 does not mention freedom of press. Therefore, when a newspaper is published, its correspondents, its editors, its publishers are exercising their individual right of free speech. Commercial advertisements, yellow pages, comprising paid advertisements, are also protected within freedom of speech and expression. This is a leading case of Tata Press Limited Mahanagar Telephone Niga. If you are a performing artist, whether you perform on the streets or in theatre, that expression, dramatic expression is protected and included with freedom of speech. How can you speak if you do not have the information? And therefore, freedom of speech includes right to information. We now have a right to information act. So, from any public authority, you can seek information. If that information is denied, you can file an appeal before the first appellate authority in that organization. Subsequently, you can go in appeal either to state information commission or to the central information commission. Right to fly national flag is also included within freedom of speech and expression. But in America, the courts have held that even burning of the flag is part of freedom of speech. In India, we do not follow it. We have a national honor sect. Any disrespect to national flag is a punishable offense. Let us now come to the restrictions because you cannot understand a right without restrictions. I told you in the beginning, no right is absolute. I told you reasonable restrictions can be imposed on freedom of speech and expression. But what are those restrictions? Article 19, clause 2 tells us reasonable restrictions in the interest of or in relation to following can be imposed to curtail your freedom of speech and expression. Sovereignty and integrity of India. This restriction was not there in the original constitution and was inserted by the 16th constitutional amendment in 1963. So you cannot say anything against the sovereignty of the country or against the integrity of the country. Sovereignty and integrity of the country should not be violated through freedom of speech and expression. And therefore any speech which in any way comes in way of our sovereignty and integrity it is to be curtailed. We exist because of our country. So security of our country, security of a state is a very important restriction. Freedom of speech does not entitle anybody to compromise or say anything which in any way impinges on the security of our state. Friendly relations with foreign states. This restriction was also not there in the original constitution and was inserted by the first amendment in 1951. So if we have good relations with America, don't write things which can damage our friendly relations with America. Public order. This restriction was also inserted by the first constitutional amendment in 1951. Nobody has a right to speak or write anything which in any way adversely affect the public order, create disorder in the

society or chaos in the society. A state will be well within its right to curtail your freedom of speech and expression if it feels that there is a danger to public order. Then, disence your morality. Don't talk indiscent things. Already in our Indian penal code, obscenity is a crime from sections 292 to 296. Contempt of code. You have freedom of speech and expression but don't attribute motives to judges. Of course, the power of the contempt of code is sparingly exercised. But if you say anything against the code or judges, then your freedom of speech and expression is to be curtailed. We have a separate act, contempt of codes act 1971 which punishes both civil contempt as well as criminal contempt. Now how these restrictions are to be imposed? Not by a government order. Not by an executive order. Freedom of speech is important. Fundamental rights are important. Therefore, if these rights are to be curtailed, they should be curtailed by the laws enacted by the parliament or the SMEs. This was the judgment in express newspaper limited versus union of India. Freedom of speech also does not give you a right to indulge in hate speech. Hate speech is also a kind of a crime under section 153A and word 153B of Indian penal code. Don't make any imputation against anybody's religion or don't doubt anybody's patriotism. Before 2015, online and offline speech were treated on different pedestals under law. Section 66A of Information Technology Act 2000. It made a provision for punishing anyone who posted material that was grossly offensive, inconvenient, injurious, menacing, incorrect or insulting. Supreme Court in Shreya's single case, Easter Downs Section 66A. Only government agencies or judiciary now can get any content removed from the net. So today, what did we learn? We learned about importance of freedom of speech and expression. We learned about the four values which freedom of speech and expression serves. We talked about what freedom of speech and expression contains and what restrictions can be imposed on freedom of speech and expression. In the next lecture, we shall talk about right to life and personal liberty. Thank you very much.

Chapter 8 - Lecture 8

Lecturer: Prof. (Dr.) Faizan Mustafa

Namaskar, welcome to online course on Indian Constitution offered by Nal??ar University of Law and sponsored by Ministry of Law and Justice Government of India. Today we are going to talk about the most important of all rights, the right to life and personal liberty. Now why right to life and personal liberty is so important? Right to life and personal liberty is rightly said to be the heart of fundamental rights. Because only when you are alive you can exercise other rights. If you are dead you cannot exercise your right to speech. If you are dead you cannot practice or propagate any religion. If you are dead you don't need equality. So first of all your life must be protected and guaranteed. Then only you can exercise other rights. Therefore right to life and personal liberty is indeed the heart of fundamental rights. Now this right is the pre-module right which every human being anywhere in the world at all times ought to have. This is a natural right, basic right, it has been included in universal declaration of human rights and all other international covenants. And this is an inalienable right. You do not have a right to eliminate your life or extinguish your life or you take away your life. Now right to life and personal liberty did find a reference in Magna Carta of 1250. Now Magna Carta is said to be the first major document. Of course Magna Carta largely guaranteed just the procedural rights. Nevertheless we need to understand its importance. Magna Carta was basically giving rights to the balance, to the elite. And Magna Carta within no time was revoked by the Pope because the then Pope said that King John's consent for Magna Carta was not a free consent. Still one must concede that it was a mild stone in the history of rights. And what did Magna Carta say that no man shall be taken or imprisoned or diseased or outlawed or banished or anyways destroyed. Nor will the king pass upon him or commit him to prison unless by the judgment of his peers or the law of the land. It was a mild stone. It is guaranteeing rule of law. It is guaranteeing rights of the arrested people. It is guaranteeing right not to be condemned without the due process of law. So what is the significance of Article 21 which in India in our constitution guarantees right to life and personal liberty. The state itself was brought into existence for protection of life and properties. Therefore the very reason of creating a state if you go by the social contract theory was that people's lives are to be protected and their properties are to be protected. Article 21 is important because it protects the sanctity of human life. Life of each and every human being is precious. Article 21 embodies constitutional value of supreme importance in a democratic society. Human life is impossible without protection of life and personal liberty. Now if you look at the drafting history of Article 21 originally it was Article 15 and it was debated in our Constituent Assembly on 6th and 13th

of December 1948. There was a difference of opinion amongst the members because we had an option of including due process of law which is an American doctrine. But many members in the Constituent Assembly felt due process doctrine is vague. It gives too much of powers to the judges and therefore to bring in certainty in our constitution we opted for procedure established by law which is inspired by the Japanese constitution. So the original Article 15 said no person shall be deprived of his life or personal liberty except according to procedure established by law. Nor shall any person be denied equality before the law or equal protection of laws within the territory of India. So right to equality and right to life and personal liberty were initially clapped together. Subsequently they were separated and the second part of draft Article 15 finally became Article 14 and the first part became Article 21 and what does Article 21 say? No one shall be deprived of his life or personal liberty except according to the procedure established by law. We have discussed earlier that there are fundamental rights which we have guaranteed only to citizens. Article 19 writes here in 21 just like Article 14 write to equality we are giving this right not only to our citizens but even non-citizens. Even foreigners will have a right to life and personal liberty in India. What is the meaning of life? What is life? Life does not mean mere animal existence. If you are just allowed to survive and breed that is not life. Life extends to all those limbs and faculties by which life is enjoyed. In many Kagandhi verses Union of India 1978, judgment of the Supreme Court it was held right to life is not confined to physical existence but it includes right to life with human dignity. This is important. Right to life is not mere animal existence. It includes right to live with human dignity and whatever is required for human dignity must be guaranteed. And then Managagandhi further held that all that goes with it namely the bare necessities of life such as adequate nutrition clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms freely moving about etc. They are all part of right to live with human dignity and they are part of right to life and personal liberty. They are included within the expression life. Right under Article 21 as I already told you is available only to natural citizens. In Article 14 we had discussed even companies are entitled to equality but companies cannot have a life like human beings. So this is a right available to natural persons and of course I told you even non citizens. In all that tell this verses Bombay Municipal Corporation 1985 judgment of the Supreme Court it was held right to life includes right to livelihood. You must have means of livelihood then only you can sustain life. Many a times we come across a situation where somebody is injured in an accident. He is taken to the private hospital unless you make a payment the hospitals refuse to start treatment. In Pashim Banga Ket Masdur Samithi was a state of West Bengal it was held by the Supreme Court that right to health is included within right to life and personal liberty and right to emergency medical aid even in private hospitals.

So generally the address of rights is a state. Generally you can move in rich jurisdiction against state but when it comes to right to health the private medical colleges hospitals too must start your treatment immediately because it is part of your right to life. There are series of cases which were filed by MCMATA in one such case in 1987 Supreme Court held right to unpolluted environment is part of right to life. Of course if air is not clean if you have pollution all over you can't get oxygen then your life is either going to be shortened or may even come to an end right to shelter is included within right to life. In only Krishna verses state of Andhra Pradesh 1993 judgment of Supreme Court Supreme Court said right to education of children till 14 years of age is also included within right to life. Of course this was one of the directive principles as well but remember higher education is not included in the new education policy which the government recently launched there are possibilities of expanding this right to include even higher education. In 2002 86 amendment of the constitution was made and article 21 A was inserted which now guarantees as a fundamental right as a part of right to life free education for children between the ages of 6 to 14 and subsequently to implement this constitutional mandate. The right of children to free and compulsory education RTE Act was passed in 2009 right to reputation is included within right to life we discussed it in the freedom of speech lecture defamation is a restriction on freedom of speech why it is a restriction because somebody else have a right to reputation. Similarly right to free an SPD trial is implicit within article 21 why because justice delayed is just denied of course justice harried is just is buried but we have huge backlog of cases and therefore we don't get SPD trial. Now Supreme Court has said getting SPD trial getting a fair trial are very much part of right to life and personally but in image Huskot versus state of Maharashtra Supreme Court said right to legal aid is also part of right to life. And in Ramdev versus home secretary right to sound sleep there was a protest going on in Ramlila madan and then there was a police raid in the night Supreme Court said right to sound sleep is very much part and parcel of right to life and personally but in. Now what is not included in right to life there is a famous case of Supreme Court P Ratnam versus Union of India where Supreme Court is strangely held that right to life includes right to die they also quoted my article at number of places in this judgment. So, this judgment was overruled rightly overruled in Gyan Kaur versus state of Punjab in 1996 so no one has a right to take his or her own life right to life does not include right to die right to vote is not included with an article 21. Right to property is not included with an article 21 therefore, if somebody is displaced due to land acquisition he cannot claim a right under article 21 right to revision of pay all the time government employees keep asking that our salaries are low and they be revised there is no right to revision of pay. There is no right to minimum support price MSP under article 21 for the crops lot of debate is going on on MSP. Now let us come to personal liberty what is

personal liberty the expression liberty in American constitution is given much wider meaning and it is said word liberty takes in all the freedoms. So, liberty is not confined just to bodily restraints and extends to full range of activities which an individual is free to pursue. In our article 21 this word liberty is preceded by another word what is that word personal right to life and personal liberty what article 21 says no one shall be deprived of his life or personal liberty. Now it is argued that since this word personal comes before liberty does that mean that Indian guarantee of liberty is narrower compared to American right to liberty in collapsing versus state of UP it was an interesting case. This man was involved in some daquiti when he was released the police will come in the night make domicillary visit knock his door to find out whether collapsing is in the house or not and collapsing challenged those rules of code of criminal procedure saying that they are not allowed to go to the house. So, they are violating my right privacy my right to liberty and here Supreme Court said personal liberty is not confined just to a personal right not to be subjected to imprisonment arrest or other physical coercion in any manner that does not admit of legal justification. Whether it includes all liberties of man not included in article 19 clause one you know article 19 clause one is called charter of liberty number of rights are guaranteed there freedom of speech freedom to form association or unions right to move freely throughout the territory of India freedom of trade and occupation or business. Here Supreme Court said whatever is not included in article 19 is included in article 21 therefore article 19 talks of specific liberties an article 21 talks of residual liberties in many Kaganadi versus union of India Supreme Court said expression personal liberty is of widest amplitude and the law of freedom. So, what is included in personal liberty we had a leading case in 2017 on right to privacy in justice came to Swami versus union of India so Supreme Court said right to privacy is the part of constitutional core of human dignity. It is included within article 21 the court said even silences of the constitution are important therefore even though right to privacy is not mentioned in article 21 yet it is part of 21 of course like any other fundamental right right to privacy is not an important thing. But privacy is important because it is part of personal liberty and part of human dignity thus even a women of easy virtue is entitled to right to privacy telephone tapping will be a violation of right to privacy. But if somebody is HIV positive and the doctor discloses his status to the would be wife it will not be treated as violation of right to privacy right to travel abroad is part of personal liberty right of prisoner to write a book is part of personal liberty. He also has a right to socialize with family members hand-cuffing of the accused is permitted only in extraordinary situations passive euthanasia I just told you right to die is not there. P. Ratinam judgment was wrong. Gyan Kaur Akoopa is the field today but if somebody is suffering from an incurable disease and is in vegetative state then passive euthanasia can be opted for right to choose a spouse whom

you want to marry is definitely included within right to privacy. So, I will give you personal liberty right to compensation in Rudhal's or versus state of behar Supreme Court said even while exercising rich jurisdiction for the violation of article 21 compensation can be avoided. So, the remarkable new development because generally in rates orders are issued but here compensation was given delay in execution you have been given death sentence but you have not yet been executed. So, all the time you are having the horror of death Supreme Court said delay in execution is violative of right to life and personal liberty. Rajasthan High Court in one case said there should be public hanging the matter went to the Supreme Court and Supreme Court said public hanging would be cruel punishment in human punishment and therefore it is violative of right to life. Right to electricity right to pollution free water are also included within article 21 because you cannot enjoy your life if you do not get water and do not get electricity. What is the meaning of procedure established by law? We understood what is life what is personal liberty now this is the third major expression in article 21 procedure established by law means procedure established by statute or prescribed by law. This procedure must be under valid law. We are discussed in the beginning of this lecture that deliberately the framers of the constitution did not adopt due process doctrine for our right to life and personal liberty because it is a wider expression because court would then examine the justness and fairness of law and the subject of law. And the certainty of law will be a casualty. So, initially in AK Gopalan versus state of Madras 1950 judgment of our Supreme Court, Supreme Court said procedure established by law means nothing more than the procedure enacted by the state. So, if a state has passed the law that law takes away somebody's life or liberty it is enough. So, Supreme Court said in Gopalan that procedure established by law does not include due process of law. But 28 years later in Manikagandhi, Supreme Court said it is not enough that there is a law which has provided a procedure for deprivation of right to life or personal liberty. But that law must also be just fair, reasonable, non-arbitrary, fanciful or oppressive. So, merely if you have a law your procedure established by law requirement is not met. If that law does not meet the requirement of due process. So, in a way due process has come back through activist judiciary. What is the relationship between article 40 in 19 and 21? Article 14 talks of right to equality, Article 19 talks of freedom of speech and expression, an article 21 talks of right to life and personal liberty. In a Gopalan case it was held that these articles are not interrelated but they are exclusive. So, article 19 is not applicable to preventive detention. In Manikagandhi in 1978 Supreme Court said they are interconnected and ought to be read together. In recent privacy judgment also Supreme Court said rights are not to be read in silos. So, now we have to read 14, 19, 21. Since in article 14 we talked of reasonableness, in 19 we talked of reasonableness, the requirement of reasonableness will come in 21 as well. So, when can right to

life and personal liberty be suspended? Every nation at times has to declare emergency. So, article 352 provides emergency can be declared when security of India is threatened by armed rebellion or war or external aggression. Earlier word internal disturbance was also there. On the basis of which in 1975 emergency was declared now that expression has been dropped. So, article 358 says if there is such an emergency all the rights under article 19 get automatically suspended. In respect of other rights other than article 19 writes article 359 says that right to move to the court can be suspended during emergency through a presidential order. I just told you in 1975 Mrs. Indra Gandhi imposed national emergency and suspended article 21 because right to move to the court was suspended. And when many people against illegal detentions moved to the court for heaviest corpus the supreme court in ADM Jabalpur was a shifkan shukla said that they can't do anything because if right to move to the court is suspended or article 21 is suspended then the rate of heaviest corpus cannot lie. Since right to life is sacred the 44th amendment of the constitution brought in a major change by making article 21 an article 20 which talks of three rights right against exposed factor laws. So, you cannot have retrospective operation of criminal laws right against double jupadi for the same crime you cannot be punished twice and right against self incrimination this article 20 an article 21 right to life and personal liberty after the 44th amendment are now non-derogable rights and they cannot be suspended even during emergency. Now, let us come to the Adhaar judgment there has been quite a debate and a controversy about Adhaar originally it was under an executive order subsequently in 2016 Adhaar act was passed. What is Adhaar? Adhaar is a very fiable 12 digit identification number which is issued by unique identification authority of India. Remember Adhaar is not proof of citizenship it is a proof of residence number of people went to the supreme court challenging constitutionality of the Adhaar act the court initially referred the matter of privacy to the 9th judgment to which we made a reference and subsequently this matter came to be decided. So, we have a very good constitutionality of the Adhaar act and the supreme court upheld the Adhaar act barring few provisions on disclosure of personal information cognizance of offenses and the use of Adhaar ecosystem by private corporations. This while Adhaar act was upheld supreme court quashed the circular of March 23 2017 which mandated linking of mobile number with Adhaar as unconstitutional because the court said it is not backed by any law. But the court clearly held Adhaar does not violate right to privacy of course by the majority of vote 1. The court said architecture of Adhaar as well as provisions of Adhaar act do not tend to create what is called a surveillance state. So, what protection is available to those who are arrested or detained. Article 22 says no person is to be arrested without being informed as soon as maybe of grounds for such arrest. Nourishal he be denied the right to consult and to be defended by a legal practitioner of

his choice. We just discussed that personal liberty is beyond just bodily restraints but here specifically Article 22 is addressing the questions of arrest. Now, lawing as a profession is mentioned in Article 22 is strangely no other profession is mentioned in the Constitution of India. And then Article 22 says that anyone who is arrested is to be produced before the nearest magistrate within 24 hours. Now, these rights right to legal representation, right to be informed of grounds of arrest, right to be produced before a magistrate within 24 hours are not available to two category of persons. One enemy alien if there is an alien a foreigner who is at war with our country or whom our government has declared as the enemy, we will not give this protection to them. Similarly to those who are arrested under preventive detention laws like NSA National Security Act or unlawful activities prevention act or in 1975 many people were arrested under MISA. Now, these preventive detention laws are justified because prevention is better than cure. So, the man has not yet committed the crime but he is detained or arrested prior to the commission of the crime. We have seen in the context of HIV AIDS that prevention is the only cure and right now we are experiencing in COVID-19. The prevention is the cure and therefore we must not go out without all the safety protocols and always keep our mask on. So, no detention article 22 says beyond three months except on the recommendation of an advisory board consisting of members who are or have been or are qualified to be appointed as high court judges. 44th amendment in 1978 further tried to humanize preventive detention laws but this amendment has not yet been notified. So, what did we learn today? Right to life and personal liberty is the most precious and most important fundamental right. American due process clause which was not there originally in our constitution has now been judiciously incorporated by the judgements of the court. In the next lecture we will talk about another very important fundamental right freedom of religion. Thank you very much Dhanavar.

Chapter 9 - Lecture 9

Lecturer: Prof. (Dr.) Faizan Mustafa

Hello, welcome to the online course on Indian Constitution offered by Nalsari University of law and sponsored by Ministry of Law and Justice Government of India. In the last lecture, we talked about Article 21 and 22 that is right to life and personal liberty and rights of people who are arrested. Today we are going to talk about a very important fundamental right that is freedom of religion. We would cover articles 25 to 28. We would also make a reference to Article 44 that is uniform civil code and look at what are the restrictions which can be imposed on freedom of religion. Now what is the importance of religion? Religion has been at the center of human society's existence since time immemorial. The Indian society displays a manifest tendency towards an outlook that is predominantly religious. And that is why Sir Harcoot Butler has said the Indians are essentially religious as Europeans are essentially secular. Religion therefore is still the alpha and the omega of Indian life. Now what are the guiding principles of freedom of religion? From where we have got this freedom of religion, the Hindu concept of serve Dharma Sambhav, the idea of all religions are true, justifies tolerance and accommodation of distinctive religious identities. The concept of equality, a sameness of all religions was inspired by this doctrine, Sir Harcoot Butler, accordingly no one religion is given preference in India or another religion. Therefore under Indian constitution freedom of religion is premised on the belief that every human being has inherent dignity to explore his or her conscience and pursue the truth. Now what does freedom of religion achieve? What are the benefits of freedom of religion? If we give freedom of religion we achieve solidarity. The word used for solidarity in the preamble of Indian constitution is fraternity. We have already said in our lecture on preamble that we do not talk about fraternity, the idea of concept of brotherhood and sisterhood. Gandhi ji was convinced that genuine religion which to him was a personal affair in its true, complete and virtuous form constructed bridges of solidarity between people. Let religions unite people, not divide people. And this was an important observation coming from our father of nation because our country was ravaged by partition. Our framers of the constitution hoped that liberty of belief, faith and worship would promote fraternity, hoping that it would create conditions ripe for peace and harmony. Is freedom of religion really beneficial for the country? Yes, because religious practice promotes the well-being of individuals, families and the larger community. It turns out that the practice of religion has a significant effect on the happiness and overall sense of personal well-being. Happy people tend to be more productive and law-abiding. They make good citizens. Religious people are likely to be more honest due to the fear of God. Of course some religious

fanatics are also corrupt and do indulge in all kinds of immoral things. The word Dharma under our ancient culture means righteousness. What is religion therefore? Religion to us is to do right. It is to serve humanity. What is religion? No precise definition is possible. Professor White had defined religion as what the individual does with his own solitariness. Dr. S. Radha Krishna, who was our president, said that religion is the code of ethical rules. And it also means rituals, observances, ceremonies and modes of worship which are its outer manifestations. Now what is the relationship of religion with the state? The kind of relationship state will have with religion will determine whether we are a theocracy or we are a secular state. Secularism in India, unlike the West, was not aimed at creating a wall of separation between church and state. We Indians do not believe in the two-sword theory that religion and state cannot be together. Taking the American experience as the referring point of secularism, it can be argued that secularism is an alien concept for India as we did not have similar historical experience where religion and state had been at loggerheads in Europe. Therefore if you look at our ancient Hindu society, we were largely secular. This word was inserted by the 42nd Amendment in 1976. But simultaneously we should also remember that we also did not include word God in our preamble. In our discussion on preamble, I talked to you about several constitutions, more than 60 constitutions in the world which start in the name of God. In India we rejected this proposal and we said we will not start our constitution in the name of God. What after all is secularism? Secularism was presented perhaps as the only option to regulate intergroup behavior due to circumstances of post partition India. The fear in the framers of Indian constitution was, Pakistan has been created. We are now left with some minorities because majority of Indian Muslims refuse to go to Pakistan. Now these people should not think that India has now become a state of Hindu majority. And therefore to assure them that their freedom of religion, their right to worship, their cultural rights will remain protected. The framers of Indian constitution so drafted our constitution that even without what secular we were a secular state. And that's why in 1973 in Keshav Anandh Bharati case when what secular was yet not there in the preamble, Supreme Court of India held that secularism is the basic structure of Indian constitution. So we did not become secular after 1976. We were secular from day one. What kind of secularism therefore we have created? Indian state is religion neutral. It respects all religions. It maintains equidistance from all religions. It has no religion of its own. But people are free to follow whatever religion they want to follow. What is freedom of religion under Indian constitution? Articles 25 to 28 deal with freedom of religion. Articles 25 talks of freedom of religion of everyone. Individuals freedom of religion. And look at the generosity of framers of Indian constitution. Unlike article 19 writes which are given only to the citizens when it comes to freedom of religion we have given this right even to foreigners. Freedom of

conscience has three crucial rights. What are these three crucial rights? Right to profess any religion. Right to propagate one's religion. Right to practice one's religion. Let us discuss it in some details. What restrictions state can impose on freedom of religion? I think the very opening words of article 25 give us an indication that freedom of religion has to operate in a very very restricted narrow territory. Unlike other fundamental rights. Freedom of religion has been subordinated to public order, health, morality and other provisions of part three which means all other fundamental rights. No fundamental right has been subordinated to all other fundamental rights except freedom of religion. Because religions are old. We want to create a society which is modern and progressive which believes in the spirit of inquiry and scientific temper. Therefore if there is a conflict between right to equality and freedom of religion right to equality would prevail. If there is a conflict between freedom of speech and freedom of religion freedom of speech shall prevail. Going forward to the powers state has in respect of freedom of religion. State can through law regulate any economic financial, political or other secular activity which may be associated with religious practices. State can make a law providing for social welfare and reform or throwing open of Hindu religious institutions of public character to all classes and sections of Hindus. Why this provision? Because untouchables historically in India were not allowed entry in the Hindu temples. Accordingly several temple entry laws had to be enacted. In article 17 untouchability had to be abolished. But look at article 25 only public temples are covered. Private temples are not within the mandate of article 25. You must be aware of huge controversy about the entry of women in Sabri Malat temple of Lord Ayapa. Historically and culturally women are not allowed there. Women of certain age. The matter went up to the supreme court. Supreme court permitted entry of women. Why? Because court said devotees of Lord Ayapa are not distinct sect of Hinduism. Moreover the court said if you look at article 25 entry of Hindu temples has been guaranteed to all sections of Hindus. Women constitute a section of Hindus and therefore they must be permitted. In the recent Kerala election number of political parties were referring to the supreme court judgment. Some in favor of judgment others opposing the judgment. But supreme court itself had agreed to review Sabri Malat judgment. And the matter has been referred to a larger bench which could not hold hearings due to COVID-19. Since a reference has been made to term Hindu in article 25 we must understand who is a Hindu. Article 25 does not talk of any religious community other than Hindus. It defines Hindus because Hindu temples were open for all classes of Hindus. And therefore who is a Hindu is necessary. Hindu definition in article 25 is not in terms of beliefs and doctrines of Hindu religion. It is an inclusive definition that tells us who is included amongst Hindus. It does not tell us these are the fundamental beliefs which a person should have to be called a Hindu. No. What it merely says 6

Jains but these are included within the term Hindu. Hindu Marriage and Hindu Succession Act in their definitions of term Hindu include any person who is Hindu by religion in any of its forms or developments including Vir Shaveya, Alingayat or a follower of Abraham Pratna or RS Amaj. And any person in India who is not a Muslim, who is not a Christian, who is not a Parse or who is not a Jew is considered as Hindu. That brings me to the whole question does freedom of religion and a right to propagate religion include right to convert others to your religion. The state forward simple answer is no. What propagate was indeed inserted in article 25 on the demand of the Christian members of the Constituent assembly. Christian members were very insistent on the inclusion of word propagation because it is the central tenant of Christianity. If you look at international human rights law, article 18 of Universal Declaration of Human Rights is specifically mentions this word. It says everyone has right to freedom of thought, conscience and religion. This right includes freedom to change his religion or believe. Similarly, article 18 of International Covenant Civil and Political Rights says everyone shall have freedom of thought, conscience and religion. This right shall include freedom to have or to adopt religion or believe of his choice. His use of loud speaker permitted under freedom of religion. The answer is no. No religion prescribes that prayer should be performed by disturbing the peace of others. Nor does any religion preach that they should be through wise amplifier or beating of drums. Religions are old, this technology is new. In the case of Church of God in India versus KKR Majestics, Kulan, Welfare Association, 2000 Judgment. Supreme Court said others have right not to be disturbed. In 2020, Allahabad High Court held Muslim Azan is not an essential Islamic practice. What are the rights of religious denominations and religious sects? If article 25 was talking about right to profess, propagate and practice religion in terms of rights of individuals, article 26 talks of freedom of religion, of religious denominations or any section thereof. Almost all religions in the world have various sects and sections, which differ from the primary religion. So Hinduism has many sects like Shivaites, Vesnavites, Shaktism, Islam has several sects of Sunnis and Shias. Christianity to has sects like Roman Catholics, Orthodox, Protestants, Jehovah Witnesses. Buddhism has sects like Mahayana and Hinyana, rights under article 26 are subject to public order, morality and health. What is the major difference? While we were talking of individuals right to religion, we had subordinated it to all other fundamental rights. When it comes to rights of a religious group, a religious denomination or any section thereof, it has not been subordinated to other fundamental rights. Article 26 confers following rights. One, every religious denomination or any section thereof shall have a right to establish and maintain institutions for religious and charitable purposes. Two, to manage its own affairs in matters of religion. Every religious group has a right to manage its own affairs in matters of religion. Thirdly, to own and

acquire immovable property and for to administer such property in accordance with law. Some states have enacted Hindu religious and charitable endowment laws. Tamil Nadu was first such a state followed by Karnataka and other states. Now these laws establish temple boards to manage certain temple properties. An argument is made that these laws are in the teeth of secularism. The validity of these laws was upheld because the court said that to administer such property in accordance with law. You have a right to own and acquire immovable property but you will administer it in accordance with law. And if there is a law called Hindu religious and charitable endowment act, then your property is to be administered under that law in accordance with that law. The courts have also said noticing that there has been mismanagement of religious properties that no religious denomination has a right to manage administer properties. It must be remembered that whenever there is a management administration, state can take over the management. But article 31 clearly says such a take over by the state must be only for a limited period. When Hindu temple property is taken over, it is vested in the state. No, property remains vested in the trust and the board which is constituted cannot have any non-Hindu as a member. And those properties are to be used only for Hindu temples. State similarly controls Muslim Wakf properties through the Wakf Act and state has a power to dissolve Wakf bodies or Wakf boards. The other crucial expression in article 26 is that religious denominations or any section thereof have a right to manage its own affairs in matters of religion. And therefore religions may say article 26 this gives us this right. Matters of religion we will manage the way we want. Supreme Court of India said no. Your right to manage your religious affairs should also be curtailed because everything and anything which your religion may ask you to do may not be permitted in a modern liberal progressive India. And therefore, Supreme Court innovated a new doctrine called essentiality doctrine under which the court determines what are the essential religious practices. And every religious community is entitled under article 26 only to practice and follow essential religious practices. When temple entry laws were challenged entry of certain sections of people into Hindu temples were challenged. Supreme Court said untouchability is not an essential Hindu practice. Similarly the courts have said that triple talakh is not an essential Islamic practice as it is not mentioned in Quran. The triple talakh was not protected because Supreme Court said three pronouncements in one go are not an essential Islamic practice. Triple talakh is not mentioned in Holy Quran. Similarly when some Muslim police officer wanted to have a beard the court said having a beard is not an essential Islamic practice. Now central government has made pronouncement of three divorces in one go as a criminal offense punishable with three years imprisonment. Can there be a religious text since we are a secular state there cannot be a religious text. Article 27 says no person can be compelled to pay any taxes. The

proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The issue of Huch subsidy has been discussed in public domain for years. Supreme Court in Prasul Ghoradiyya versus Union of India. 2011 judgment upheld the constitutional validity of Huch subsidy which is given to Air India because Air India has been given the exclusive rights to transport the country. The Supreme Court said since a small amount of income tax is used for this subsidy it is not unconstitutional under Article 27. In 2012 another bench led by Justice Aftavalam held that though Huch subsidy is constitutional but it should be done away with in 10 years. Can there be religious instructions on prayers in educational institutions? The answer is yes and the answer is no because it all depends on the type of educational institution you are talking about. Is it a fully funded institution funded by the state or is it state recognized or is it an educational institution created or established under some trust? Article 28 lays down no religious instruction shall be provided in any educational institution which is wholly maintained out of state funds. So if it is a government institution 100% funded by the state no religious instruction whatsoever can be provided. But religious instruction can be provided in institutions maintained by the state if such an institution was established by a trust or under an endowment that requires religious instruction being parted. So if some trust has originally established some institution that trust requires that every morning there will be religious prayer. Now state is maintaining that institution. Religious instruction can be imparted then. Then thirdly institutions receiving aid or recognized by the state they may not receive aid but if they are recognized by the state cannot impart any religious instruction or require attendance at any religious worship without the consent of the parents or students. Many of us who had gone to Christian institutions know that they do hold prayers in the morning but to hold such prayers they take consent of the parents. Finally let me briefly discuss uniform civil code and personal laws. Mughals did not interfere with the Shastrik Hindu law and allowed Hindus to be governed by their religious laws in their religious courts. British continued this policy and did not interfere in the personal laws of religious communities. But realizing that personal law provisions were arbitrary were in human. British did initiate reforms and Islamic criminal law was replaced with modern and humane criminal reforms in the form of Indian penal code, code of criminal procedure Indian evidence act. Hindu law reforms committee was established in 1941 and after independence we enacted Hindu code bill which reformed Hindu law. Article 44 which is a directive principle asked states to endeavor to have a uniform civil code. Unfortunately so far no draft of uniform civil code has been prepared and no expert committee like Hindu law reforms committee has been constituted. In triple the law judgement CGI J.S.K.H. held that right to follow personal law is part and parcel of freedom of religion. The

biggest question is is personal law law within the meaning of Article 13 because if it is law then if it is contrary to any fundamental right it is to be struck down. Both in Sabri Mala as well as in triple the law judgement of Shaira Bano supreme court left this question open for future decision. What did therefore we learn today? Freedom of religion has been guaranteed to everyone including foreigners. This is a highly restricted freedom and can be controlled by the state in a big way. This freedom does not include right to convert therefore forcible convergence are not protected by Article 25. There can be no religious texts in India and there cannot be any religious prayer in a fully funded educational institution. Or in an educational institution which receives state aid or which is recognized by the state without the consent of the parents and their students. In the next lecture we will talk about another very important fundamental right which led to lot of cases rights of minorities. See you then. Thank you very much.

Chapter 10 - Lecture 10

Lecturer: Prof. (Dr.) Faizan Mustafa

Namaskar, welcome to online course on Indian Constitution which is being offered by Nalsari University of Law and is sponsored by Ministry of Law and Justice Government of India. In the last lecture we talked about freedom of religion and went until article 28. The article 29 and 30 talk of what are called minorities, educational and cultural rights. So, in today's lecture we would see why minority rights are important, who is a minority, are Hindus to a minority in India in some states, in certain conditions. Our minority rights absolute can state regulate them, do minorities have a right to malad minister, can there be aided minority institutions and what kind of reservation can be there in a minority educational institution. So, what are the constitutional provisions on the minority rights. In the previous lecture as I said in the beginning we discuss article 25 to 28 which guarantee freedom of religion and guarantee right to profess practice and propagate one's religion. Article 26 talks of substantial autonomy of religious denominations or any section thereof. Now articles 29 and 30 they appear under the heading cultural and educational rights. Justice H.R. Kanna highlighted the significance of these provisions in the 9 Judgement of Supreme Court in Ahmedabad and Xavier's College and he said these provisions in shine a befitting pledge to the minorities in the constitution of the country whose greatest son had laid down his life for the protection of the minorities. As long as the constitution stands as it is today no tempering with those rights can be countenced any attempt to do so would be not only an act of bridge of faith it would be constitutionally impermissible and that is why you see our Supreme Court has held that minority rights are part of the basic structure of the constitution and it cannot be deleted even by a constitutional amendment. Now let us go deeper into article 29. Is it really the right of minorities? Though the head note of article 29 says protection of interest of minorities but word minority is missing from the actual text of article 29. In fact if you read article 29 you will see that article 29 clause 1 says any sections of Indian citizens having a distinct language is script or culture of its own shall have the right to conserve the same. Therefore article 29 is not a right of a minority it is a right each and every citizen of India can claim if that citizen has his own distinct language is script or culture and then article 29 clause 2 says no citizen shall be denied admission in any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion race caste language or any of them. Article 30 talks of two kinds of minorities that is minorities whether based on religion or language. It does not talk of sexual minorities it does not talk of other non dominant groups. Article 30 gives religious and linguistic minorities equal rights and since both kinds of minorities have come together and have

been clapped together Supreme Court has consistently held that minorities are to be defined at the state level as states were carved out on the linguistic lines. India has a huge religious and linguistic diversity and therefore minority rights are not rights of just Muslims and Christians are Hindus too entitled to minority rights. Many of us believe that minority rights are rights of non-Hindus. Indian Supreme Court had adopted the numerical inferiority test and not the powerlessness test in defining minorities. Accordingly minorities are defined at the level of state anyone who is less than 50% in i-state is a minority. Thus in certain states of northeast Punjab and Union Territory of Jammu and Kashmir Hindus are religious minority. In all other states Hindus are also entitled to minority rights as linguistic minorities. What are the educational rights of minorities? We are aware that now article 21a provides that state shall provide free and compulsory education to all the children of the age of 6 to 14. New education policy proposes to further expand it. Right to education act was passed in 2009 to give effect to this constitutional amendment. Article 30 is the additional guarantee a special right given to minorities to establish and administer educational institutions of their choice. Now Supreme Court in Inre Kerala Education Bill it's a leading advisory opinion of the Supreme Court of 1957. Observe the key to the understanding of true meaning and implication of the article under consideration are words of their own choice. Supreme Court said the dominant word is choice and the content that article is as wide as the choice of the particular minority community may make it. Therefore under article 30 it is the minority which makes a choice and it is within the powers of the minority to expand its choice as much as it wants. Minorities can establish educational institutions. What is the meaning of educational institution? What is the meaning of establish? Minorities can administer their institutions. What is the meaning of administer? Supreme Court said term educational institution includes a university. Therefore there can be a minority university. Supreme Court also said term establish means to find to bring into existence. In TMAPI Foundation, judgment of the Supreme Court, 11 Judge Ben Judgement. Supreme Court said that this education includes education at all levels. So university education would be covered. So under article 30 minorities are free to set up educational institutions of secular and modern education. You may recall under article 26 religious denominations or any section thereof can establish and administer religious and charitable institutions. So mother sas are not established under article 30. They are established under article 26. Under article 30 we are talking of modern liberal secular education. What is the meaning of right to administer? Right to administer means right to do day to day administration. It includes right to admit students, right to fix fees, right to choose governing body and right to discipline employees. By the way these rights are also available to all non-minority institutions as well. Narsar University of law has every right to fix its fees. Its governing body is as per its act. It has

every right to discipline its employees. So these rights right to administer in this sense are common. But then there are special ingredients of administration which are available only to religious and linguistic minorities. Our minority rights absolute. Yes and no. Why yes? Because if you look at the text of article 30 you will find that unlike fundamental rights under article 19 and 25 article 30 does not mention any restriction in the text of article 30. In article 19 from clauses 2 to 6 number of restrictions are mentioned. In article 25 the opening words themselves are restrictions subject to public order, health, morality and other provisions of this part. Article 21 you have a right to life and personal liberty but this right can be taken away under the procedure established by law. When it comes to article 30 Indian constitution textually speaking does not incorporate or mention any restriction. So it is yes. But then in India our laws are interpreted by the courts and whatever supreme court says becomes binding on all courts throughout the territory of India and article 141. So our supreme court has consistently held that no right can be absolute. So the answer becomes no. Minority rights cannot be absolute. Accordingly municipal and health regulations would be equally applicable on the minority institutions. A minority institution cannot say we will construct building without taking permission from the municipal authorities. No they do not have that right. UGC has prescribed that for these many students you should have these many toilets. No minority institution has a right to say that we will not follow UGC regulations. Similarly educational qualifications for the appointment of teachers, appointment of the principal, appointment of the vice chancellor are decided by UGC and minority educational institutions are bound by that. Can government regulate minority institutions? Yes. In Ahmedabad Sarsar College judgment. Supreme court said regulation must be in the interest of minorities not general public. So the state can come up with regulations. In Reverend Siddharj Bhai, Sbbhai, versus the state of Bombay 1962 judgment of the supreme court, supreme court said every government regulation must satisfy a dual test. One just like article 19, the test of reasonableness that the government regulation is reasonable and two that this regulation must be regulated of the educational character of the institution and is conducive to making institution an effective vehicle for the education of the minority community or other persons who resort to it. So regulations are permissible. The regulations must be in the interest of the minority educational institutions to make them more efficient. Can there be an aided minority educational institution? Yes, there are many such institutions like St. Stephen's College. Article 30 clause 2 says, is state in granting aid to educational institutions will not discriminate against any educational institution on the ground that it is under the management of a minority whether based on religion or language. No educational institution has a right to get state aid. But if state is giving aid, in giving aid state will not discriminate against minority educational institutions. In

St. Stephen's College versus University of Delhi, Supreme Court said government aid cannot come with such conditions that would virtually deprive minorities of their rights. Similarly, government regulations of recognition or affiliation or aid cannot be destructive or annihilative of minority character of minority educational institution. We also have a statutory commission. There is a national minorities commission and then you have a special commission on education called national minority educational institutions commission to safeguard the rights of the minorities. Can there be minority reservation in admissions? Because Article 29 2 says, there cannot be denial of admission on prohibited grounds of religion race etc. caste etc. The relationship between Article 30 clause 1 and Article 29 clause 2 has been subject of litigation in many many cases. Now the law has been made abundantly clear. There can be a reservation for the minority communities in a minority institution. If it is a religious minority institution, the reservation would be for the religious minority. If it is a linguistic minority institution, the reservation would be for the linguistic minority. Now Article 15 clause 5, an Article 15 clause 6 explicitly exempt minority educational institutions from states, policies of reservation. So SC, ST, OBC, reservation etc. is not applicable on a minority educational institution. The reason is that minority institutions are catering the need of specialized group. And therefore in those institutions, there will be seats reserved for those groups. But I personally believe that minority educational institutions should also ensure that the diversity of the nation is reflected in those institutions. And therefore they must make efforts to get SCs and STs and OBC students. What did we learn today? Minority rights are both for religious as well as linguistic minorities. Minorities are defined not at the national level, but at the level of state. These rights are not absolute. Government has the power to regulate minority educational institutions. In the next lecture, we would discuss the relationship between fundamental rights and directive principles. Thank you very much. Namaskar.

Chapter 11 - Lecture 11

Lecturer: Prof. (Dr.) Faizan Mustafa

Namashkar, welcome to online course on Indian Constitution which is being offered by Nal sir University of Law in collaboration with Ministry of Law and Justice Government of India. In the last lecture we talked about rights of the minorities. Today we are going to talk about directive principles. This is part four of Indian Constitution. So today we will talk about part four of Indian Constitution which incorporates directive principles of state policy. Let us first try to understand little bit theory of human rights. Human rights as you know are the basic natural rights which every human being is entitled to by virtue of his birth as a human being. During Cold War the entire world got divided into two groups and therefore human rights also got divided into the first generation and second generation rights. The civil and political rights were called first generation rights, socio-economic and cultural rights were called second generation rights. This was an artificial classification and it damaged the human rights movement. What really happened was this that the Western liberal democracies emphasized civil and political rights and the socialist countries gave more importance to the socio-economic rights. Accordingly the liberal West gave liberty and did not bother much about right to food and the socialist East provided food but denied civil liberties to its citizens. Subsequently right to environment was termed as third generation right. After the end of Cold War United Nations Human Rights Conference was held in Vienna in 1994 which resolved that all human rights are universal, indivisible and inalienable. Therefore whether rights are part of fundamental rights or they are part of directive principles they are equally important. In India Tej Bahadur Sapru committee submitted a report in 1941 that suggested that we should have some justifiable rights and some non justifiable rights. This distinction later on led to the inclusion of civil and political rights in the fundamental rights chapter and socio-economic rights under the directive principles. So what are directive principles? If fundamental rights in India were borrowed from United States, directive principles were taken from the Irish constitution. Article 37 says directive principles of chapter 4 of Indian constitution shall not be enforceable by any code. This was the influence of the Sapru committee. So directive principles like fundamental rights are not enforceable by any code. But the principles mentioned in the directive principles are nevertheless fundamental in the governance of the country. Moreover it shall be the duty of the state to apply these principles in making laws. Dr. B. Arambhayatkar called directive principles as no well feature of Indian constitution. Let us just look at various articles in directive principles and what they provide for. So article 36 says that the meaning of state which is given in article 12 shall be the same even for this chapter, even for directive

principles. Article 37 talks of applications of principles given in this part, that is part 4. And here it says that directive principles are not just issueable but they are nevertheless fundamental in the governance of the country. Article 39 tells us some basic principles of policies to be followed by the state. Article 39A talks of equal justice and freely delayed article 40 organization of village panchayats, Gandhian influence on Indian constitution. Article 41 talks of right to work, to education, to public assistance in certain cases. Article 42 mentions provision for the just and human conditions of work and maternity leave. Article 43 talks of living wages for workers. Article 43A makes a provision for the participation of workers in the management of industries. Article 43B talks of promotion of cooperative societies. Article 44 talks of uniform civil code. Article 45 makes a provision for the early childhood care and education to children below the age of six years. Article 46 talks of promotion of educational and economic interests of Shadi ul Khaz, Shadi ul Tribes and other weaker sections. Article 47 talks of duty of the state to raise the level of nutrition and the standard of living and to improve public health. Article 48 talks of organization of agriculture and animal husbandry. Article 48 speaks of protection and improvement of environment and safeguarding of forests and wildlife. Article 49 talks of protection of monuments and places and objects of national importance. Article 50 speaks of separation of judiciary from the executive. An article 51 talks of promotion of international peace and security. In this lecture, we won't be able to talk about each and every directive principle. But we will make an effort to understand the essential message of the directive principles. Some of the directive principles we have already talked at length, such as Article 46 in our lecture on reservation and Article 44 in our lecture on freedom of religion. If you look at all these articles, it becomes clear that directive principles are fundamentally based on socialistic, Gandhian and liberal principles. So what is the significance of directive principles? Article 37 to 51 contain what are termed as obligations of the state. Directive principles therefore are telling us what are the duties of the state. Dr. Birmambitkar himself explained the idea of directive principles. He said and I quote, it is no use giving a fixed rigid form to something which is not rigid, which is fundamentally changing and must having regard to the circumstances and the times keep on changing. It is therefore no use saying the directive principles have no value in my judgment. The directive principles have a great value for they lay down our ideal is economic democracy. Birmambitkar is trying to say that we do not want mere political democracy. We intend to achieve economic democracy. Preamble of the constitution itself promise justice, social and economic. And directive principles are the means to achieve these ideas. Therefore fundamental rights promote political democracy to which Ambedkar made a reference. And directive principles are aimed at achieving economic democracy. Dr. Birmambitkar went on to say that because we did not want merely a

parliamentary form of government to be instituted through the various mechanisms provided in the constitution without any direction as to our economic ideal or as to what our social order ought to be. We deliberately included the directive principles in our constitution. Unquote. Article 38 clause 1 tells us the kind of social order we want to achieve in India. It says the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may. A social order in which justice, economic, social and political shall inform all the institutions of the national life. The mandate, the duty and the obligation of the state is mentioned here. What do we want to achieve welfare of the people? How can we achieve welfare by securing and protecting effectively a social order in which justice, social, economic and political shall inform all the institutions of our national life. The Article 38 clause 2 says the state's shall in particular is strive to minimize the inequalities in income and endeavor to eliminate inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Very clearly Article 38 clause 2 is saying that eliminating the inequalities in income, the rich should not get richer and poor should not become poorer. We will minimize inequalities in income and eliminate inequalities in status, facilities and opportunities. The Article 39 tells us certain basic fundamental principles which our state must follow. These are the policy guidelines by the constitution. The state's shall in particular directs is policy towards securing that citizens, men and women equally have the right to an adequate means of livelihood that the ownership and control of material resources of the community are so distributed as best to subserv the common good that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment that there is equal pay for equal work for both men and women. The health and strength of workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength. The children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. This is the charter of economic policies of the state. No concentration of wealth. Material resources of the nation are to be so distributed they subserv the common good in a state of Bihar versus Kameshwarsi. Supreme court said land reforms were aimed at reducing concentration of wealth and land in few hands. So, Zamindari is ought to be abolished. How much land one person, one family can have is to be decided in Kesamanan and the Bharati judgment. Supreme court said article 39 is the constitutional mandate of how to develop a welfare state and an egalitarian society and how to achieve dignity of the individual. What are the provisions of the conditions of work and wages? Article 42 says the state shall make provision for

securing just and human conditions of work and make provision for the maternity relief. Number of labor laws were enacted factory is act industrial dispute sector minimum wages act workman compensation act employees insurance act. Maternity relief act was passed in 1961. The central government in 2017 made an amendment to the maternity relief act which now gives 26 weeks maternity relief for the first two pregnancies. Article 43 provides for living wages. There are three kinds of wages minimum wage. It is the lowest wage which is just sufficient for the bare subsistence of workers. The second type is fair wage which is sufficient for food shelter, clothing and education of children. The constitutional ideal is living wage. Living wage would be sufficient for a decent standard of life and full enjoyment of leisure and social and cultural opportunities for our workers. In 2020 central government consolidated all these different 44 labor laws and enacted four labor codes. What amendments have so far been made to the directive principles? Let us talk of major amendments. 42nd amendment inserted following new articles. Article 39A which says that the state shall secure that the operation of the legal system promotes justice on the basis of equal opportunity and shall in particular provide free legal aid by suitable legislation or schemes or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. If the legal system is only for the rich and excludes poor, if justice is too expensive, and it is beyond the reach of the poor, then this is no justice. Article 39A says that the state shall secure that the operation of the legal system promotes justice. Promote justice on the basis of equal opportunity and in particular, state shall provide free legal aid. Accordingly legal services authority is act was passed in 1987. Article 43A made provision for the workers participation in the management of industries. Article 48A makes a provision for the protection of in-moment and safeguarding a forest and wildlife. Subsequently, in-moment protection act 1986 was passed. 86th amendment in 2002 substituted article 45 which had originally provided for the free and compulsory education for all children till 14 years of age. The new provision provides it only until six years of age. But article 21A was inserted by the 86th amendment that has made free and compulsory education between six to 14 years as fundamental right and finally right to education act was passed in 2009. What did we learn today? Directive principles are non-justishable. You cannot go to the court of law if state is not implementing directive principles. These principles were borrowed from the Irish constitution. Directive principles are the positive obligations of the state. In the next lecture, we would discuss fundamental duties. Relationship between fundamental rights and directive principles and fundamental duties. Thank you very much. See you in the next lecture. Namaskar.

Chapter 12 - Lecture 12

Lecturer: Prof. (Dr.) Faizan Mustafa

Namashkar, welcome to the online course on Indian Constitution which is being offered by Nal sir University of Law Hyderabad in collaboration with Ministry of Law and Justice government of India. In the last lecture we talked about Directive Principles of State Policy. Today we will talk about the relationship between Directive Principles and Fundamental Rights, Fundamental duties and Fundamental Rights and talk at length about the importance and significance of Fundamental duties. Now coming to the relationship of Fundamental Rights and Directive Principles since you have already understood the whole idea of Fundamental Rights and you now know what are the Directive Principles. Let us try to understand what is the relationship between these two that is part three of the Constitution and part four of the Constitution. You would recall that in the last lecture we had discussed that Fundamental Rights are the Civil and Political Rights, what are called First Generation Rights and Directive Principles referred to socio-economic and cultural rights or the Second Generation Rights. The major difference between the two is while Fundamental Rights are justifiable, Directive Principles are non-justifiable. What is the meaning of this crucial word justifiable? Justifiable means if you are denied a right you can go directly to the Supreme Court and Article 32 or to the High Court and Article 226 in the Red Jurisdiction. If on the other hand, Directive Principles are not implemented you cannot go to the Court of Law in Working Red Jurisdiction. If you look at the Fundamental Rights chapter you will see that Fundamental Rights are basically negative restrictions on the powers of the State. When we say State shall not deny equality or everyone shall have right to life and personal liberty or everyone shall have freedom of religion or freedom of speech and expression. We are denying State power to impose censorship. We are denying State to interfere in the religious matters or we are denying State power to curtail people's personal liberties. So Fundamental Rights are fundamentally negative restrictions on the power of the State. On the other hand when you look at the Directive Principles of State policy they are positively expressed. State shall endeavor to have a uniform civil court. State shall ensure that there is no concentration of wealth or that the material resources of the country are so distributed as to subserv the common good. So Fundamental Rights are the negative restrictions. Directive Principles are the positive obligations. Fundamental Rights use very definite and certain language. If you look at the relationship in the very first case, Champakam Dorai Rajan 1951 judgment Supreme Court held that Directive Principles are subordinate to Fundamental Rights. Pandit Naro had to bring in first constitutional amendment to save the reservation policies and to overturn this judgment.

Subsequently court pronounced what is known as doctrine of harmonious construction. Under which the court said the conflict between Fundamental Rights and the Directive Principles should be avoided. And if it is to be made that both Fundamental Rights and Directive Principles are given effective. In the case of one on the Bharati case, Supreme Court said what is Fundamental in the governance of the country cannot surely be less significant than what is Fundamental in the life of the individual. As you know Directive Principles are non-justifiable but nevertheless Fundamental in the governance of the country. Fundamental Rights are fundamental in the life of the individual. Directive Principles are fundamental in the governance of the country. Amendments were made in Article 31C. Initially, it was said that Directive Principles mentioned in Article 39B and C shall prevail on Fundamental Rights of Article 14 and 19. That is right to equality, right to freedom of speech and expression, right to trade, business and occupation, right to forms, associations and unions, right to move freely throughout the territory of India. All the rights given in Article 19. By the 42nd Amendment, it was provided that all the Directive Principles shall prevail over the Fundamental Rights of Articles 14 and 19. *Indulmia cement versus Union of India*, Supreme Court said that Fundamental Rights and Directive Principles are the two wheels of chariot. None of the two is less important than the other. This nap won, the other will lose its efficacy. Together, they constitute the conscience of the Constitution to bring about social revolution under rule of law. So, it is a position which is entirely different from the right-roger. Supreme Court has held Fundamental Rights are rightful means to the end that is social and economic justice provided in the Directive Principles and the preamble. The Fundamental Rights and Directive Principles establish the trinity of equality, liberty and fraternity in an egalitarian social order and prevents exploitation. Now let us come to Fundamental duties under Indian Constitution. Technically speaking, liberal constitutions do not generally include Fundamental duties. Socialist constitutions, on the other hand, used to have provisions of Fundamental duties. Accordingly, the original text of Indian Constitution did not have any provision of Fundamental duties. Lasky has also said, rights are related to functions and are given only in return for some duties to be performed. Rights are conferred on individual citizens not only for their own development but also for social good. An individual is the Fundamental organ of the state and each organ is required to work unitesedly to achieve the means of welfare state. You know Fundamental rights are directed towards state. An individual is also an important organ of our country. If you look at Article 29, clause 1 of Universal Declaration of Human Rights, it says everyone has duties to the community in which alone the free and the full development of his personality is possible. Duties to the community is the inspiration from which Fundamental duties will come. Soviet Constitution, since it was a socialist constitution, also has provision of duties. When

you come to our country, you have to see how we treat duties. What is the importance of duties of people in Indian culture? The concept of duties has its origin in the Vedas and they are in the form of religious commands. It picks like Bhagwatgita, Ramayana and Habharatha, in Shrinan duty as part of one's Dharma. Doing one's duty under our culture is our Dharma. Indian society is culturally a duty conscious society and we believe that the only right we have is the right to do our duty. Father of nation Mahatma Gandhi ji, while emphasizing socio-economic responsibilities of citizens said, the true source of right is duty. If we all discharge our duties, rights will not be far to seek. If leaving duties and performed, we run after rights. They will escape us like, oh the whisp, the more we pursue them, the farther they will fly. Rights accrue automatically to him who duly performs his duties. In fact the right to perform once duties is the only right that is worth living for and dying for. It covers all legitimate rights. All the rest is grab under one guy's or another and contain in it seeds of hymnsa. The same teaching had been embodied by Lord Krishna in the immortal words and I quote, action alone is time. Leave thou the fruit severely alone. Action is duty, fruit is the right. Gandhi ji also said, he learned from his illiterate but wise mother that all rights to be deserved and preserved come from my duty well done. Does the very right to live accrues to us when we do the duty of citizenship of the world is not talking of citizenship of India. This is the same idea which Tagore was talking about, humanism, universalism. The fundamental duties which are obligatory in nature inculcate an instil a sense of obligation and discipline amongst the citizens towards their duties. These duties serve as a constant reminder to the citizens that there has to be a balance between rights and duties. Their assertion of rights is not correct without being responsible for abiding by one's duties especially when our constitution, the supreme law of the land prescribes those duties. How these fundamental duties which were not there in the original constitution got inserted in our constitution? The Saurant Singh Committee had recommended that certain fundamental duties and obligations of every citizen should be included in the constitution. These recommendations were implemented when article 51a was inserted through the 42nd amendment. But Saurant Singh Committee had also made a recommendation of imposing punishment and penalties for not performing one's duties that was not accepted by the government. Let us not talk of what are the fundamental duties. Under article 51a it shall be the duty of every citizen of India to abide by the constitution and respect its ideals and institutions, the national flag and the national anthem. To cherish and follow the noble ideals which inspired our national struggle for freedom to uphold and protect the sovereignty, unity and integrity of India. To defend the country and render national service when called upon to do so. To promote harmony and spirit of common brotherhood amongst all the people of India, transcending religious, linguistic and regional or sectional diversities to

renounce practices derogatory to the dignity of women. To value and preserve the rich heritage of our composite culture to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures. To develop the scientific temper, humanism and spirit of inquiry and reform. To safeguard public property and to absorb violence, to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to the higher levels of endeavor and achievement. And then in 2002 by the 86th Constitutional Amendment, we added a fundamental duty of parents and guardian to provide opportunities for education to his child as the case may be or what between the age of 6 to 14 years. Our Constitution is the result of many commitments, promises and pledges made by framers of the Constitution to the people of India. We have one Constitution, one flag, one people and one citizenship. We have to be really proud of our nation, our national flag and our liberal and far-sighted Constitution. Therefore, the first and the foremost duty of every Indian is to abide by the Constitution. To respect its ideals and institutions, the national flag and the national anthem. These are the very physical foundations of our citizenship. Similarly, we are not supposed to indulge in any activity which goes against the letter and the spirit of the Constitution. We must inculcate constitutional values in ourselves. We need to cherish and follow the noble ideals of our national freedom struggle. We must uphold and protect the sovereignty, unity and integrity of India and if necessary to defend it. Article 192 restricts fundamental rights to protect our sovereignty and unity. There is a whole chapter in Indian penal code chapter 6 which deals with offenses against the state. The duty of defending our territories is primarily of our forces but if necessary, we should be ready to make supreme sex defies for our motherland. Our cultural heritage is one of the noblest and the richest. You must value and preserve the rich heritage of our composite culture. What is the relationship between fundamental rights and fundamental duties? Generally it is said rights and duties are correlative. There is no right without a duty and therefore anyone who is interested in right must also be sincere about his duties. But framers of Indian constitution have not said that you will not get your right if you do not do your duties. Like fundamental rights and like direct principles, fundamental duties are also non-justifiable and therefore, rich jurisdiction cannot be invoked in respect of fundamental duties. But in reality, fundamental duties are as important as fundamental rights. And Javed versus the state of Haryana Supreme Court held that fundamental rights are to be read with fundamental duties. So fundamental duties are non-justifiable and therefore their implementation requires aspiration of citizens. We cannot invoke criminal sanctions but our citizens must aspire to be good citizens. We must make these fundamental duties as part and parcel of our character, our character as citizens of this great country. How supreme court has used fundamental

duties? In *Mohan Kumar Singhaniya versus Union of India*, in order to uphold the constitutionality of amendment to service rules of all India services, supreme court had a record to fundamental duties. In *Well or Citizens Welfare Forum versus Union of India and Bandkhaal and Suraj Khan Leix Matter 1996*, supreme court recognized the precautionary principle, the polluter pays principle as essential features of sustainable development and part of environmental law of the country in view of article 21 and 51 AG. There are several cases in which supreme court has considered the importance of fundamental duties as rule of law. The apex court has held that fundamental duties do not enforceable by the writ of the court, yet they provide valuable guidance and aid to interpretation and resolution of constitutional and legal issues. Political duties were in fact already imbibed in various Indian laws prior to the enactment of fundamental duties in article 51A of our constitution. What recommendations have been made in respect of fundamental duties? Justice J.S. Varma Kamedi in 1999 said, Citizenship is a Solomon duty which every individual must discharge with due diligence and dedication. The current conjecture of social, economic and political forces calls for a movement which captures the imagination of masses and motivates all categories of citizens to abide by the provisions of the constitution in performing their duties and exercising their rights. J.S. Varma Kamedi had also suggested that January thought should be celebrated as fundamental duties day and we should organize on a regular basis, ad hoc AC and sensitization programs on fundamental duties. The committee has said, preamble of the constitution, an article 51A should be appropriately displayed on all government publications, diaries, calendars at public places so that they always get attention of the people. In 2002, Justice M. Venkat Chalaiya commission recommended the first and foremost step required by the union and the state governments is to sensitize the people and to create a general awareness of provisions of fundamental duties amongst the citizens. What did we learn today? One fundamental rights are justifiable, directive principles and fundamental duties are nonjustifiable. All directive principles today prevail over fundamental rights of article 14 and 90. Today fundamental duties are given equal importance with fundamental rights. In the next lecture, we would discuss the union executive. Thank you very much. Namashka.

Chapter 13 - Lecture 13

Lecturer: Prof. (Dr.) Faizan Mustafa

Namaskar, welcome to online course on Indian Constitution which is being offered by Inalcer University of Law in collaboration with Ministry of Law and Justice Government of India. After discussing fundamental rights, directive principles and fundamental duties, let us now talk about the Union Executive and the President Prime Minister relationship. You know we had adopted the parliamentary democracy due to our familiarity with the British parliamentary system as we were ruled by the British for about 200 years. Now there are three organs of the Union, Union Executive, Parliament and Union Judiciary. Part five of Indian Constitution deals with the Union and its chapter one provides for the Executive. Chapter two deals with Parliament, chapter three provides for the legislative powers of the President that is audience making powers and then chapter four deals with Union Judiciary. Who is included within Union Executive? Union Executive consists of following President of India, Vice President of India, Prime Minister, Council of Ministers, Attorney General. Since we are going to talk about President and Prime Minister and Council of Ministers, let me briefly say few things about Vice President and Attorney General. Vice President of India is the ex-official chairman of Rajasabha. He is the only chair of the house who is not the member of the house. Vice President is not the member of Rajasabha, but he is the chairman of Rajasabha. When President is not available, Vice President operates or discharges the duties of the President, when President has to give his resignation, he gives it to the Vice President. Vice President is elected by both the houses of the Parliament. Coming to Attorney General, Attorney General is the Government of India's lawyer. He has precedence over all other lawyers and advocates in the country. Attorney General of India can also participate in the proceedings of the Parliament, but generally the Government discusses legal issues with the Attorney General and governments stand in the court is invariably put forward by the Attorney General of India. Now why do we have a President? Though we have adopted the British Parliamentary System, but we do not have any queen or king as our head of the state. Monarchy has come to an end in India in 1857, then princely states joined Indian Union, merged themselves into the Indian Union, therefore there is no king or queen anymore in India. For preamble claims India as Republic, which means that we will have a head of the state who will be an elected head of the state. Accordingly the Indian Constitution makes a provision for the President who is elected every five years and who is head of our state. On the other hand, the Prime Minister is the head of the government. So may keep this distinction in mind. The head of the government is Prime Minister, but head of the Indian state is the President of India. How is President

of India elected? Article 52 of the Constitution says there shall be a President of India. Article 54 says the President shall be elected by the members of an electoral college consisting of the elected members of both houses of parliament. And the elected members of legislative SMEs of the state, this expression elected is important. Those nominated members either in parliament or in a state as a family, cannot participate in the voting of President of India. And the article 71 of Indian Constitution, all disputes about the President shall be inquired into and decided by the Supreme Court and this will be the final decision. Whatever Supreme Court says shall be the last word. Who is eligible to become President? Article 58 lays down the qualifications which an individual must possess for being elected to the office of President of India. Number one, he must be citizen of India. Number two, he must have completed the age of 35 years. Number three, he must be qualified for election as a member of the House of People, Lok Sabha, which means he must be registered as a voter in any parliamentary constituency. Fourthly, he must not hold any office of profit under the government of India or the government of any state or under any local or authority subject to the control of the government of the union or any state. The President of India cannot hold any office of profit. But for the purposes of this article, a person who is the President of India or who is the governor or a minister in the center or the minister in the state shall not be deemed as holding an office of the President. And therefore, when our current President Ram Nath Kovinji was elected, he was the governor of Bihar. So if I want to contest the election of the President, then I cannot remain an employee of the government. You have to leave your office of profit. What oath or affirmation President takes before entering upon his office? This is a very important provision. Generally, the oaths in our Constitution are given in a separate schedule. Shedul, third, third, Shedul. But for the President, the oath is mentioned in the text of the Constitution. Every President and every person acting as President or discharging the functions of the President shall before entering upon his office make and subscribe in the presence of the Chief Justice of India or in his absence, the senior most judge of the Supreme Court available and oath or affirmation in the following form. That is, I, so and so swear in the name of God or solemnly affirm that I will faithfully execute the office of the President or discharge the functions of the President of India and will to the best of my ability. Preserve, protect and defend the Constitution. Very important expression. Preserve, protect and defend the Constitution and the law. And I will devote myself to the service and well-being of people of India. We would in few minutes discuss the importance of this oath in examining the position of the President and his relationship with the Prime Minister. How President can be removed? Article 61 talks of impeachment of the President. When a President is to be impeached for the violation of the Constitution, so President of India can be impeached only on one

ground that he violated the Constitution of India, the charge shall be preferred by either House of Parliament. No such charge shall be preferred unless the proposal to prefer such charge is contained in a resolution which has been moved after at least 14 days notice in writing signed by not less than one fourth of the total members of the House, which wants to move that resolution. The first of all you need one fourth members signing the proposal to impeach the President. And then that resolution must be passed by a majority of not less than two thirds of the total membership of the House. I will explain to you in a minute what are the various types of the majorities under our Constitution. So one President of India can be impeached only for the violation of the Constitution. Two before you move the impeachment resolution 14 days notice is to be given and this should be signed by one fourth members of that House and then this resolution should be passed by two thirds of the total membership of the House. When a charge has been so preferred by either House of Parliament the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation. If as a result of investigation a resolution is passed by the majority of not less than two thirds of the total membership of the House by which the charge were investigated or cause to be investigated declaring that the charge preferred against the President has been sustained. Such a resolution shall have the effect of removing the President from his office as from the date on which such a resolution is so passed. Now remember that for no other provision in this Constitution two third majority of total membership of the House is required. To become the Prime Minister what you need is simple majority and therefore it is important that we understand various types of majorities required by our Constitution. Simple majority which is required to pass most laws which is required to pass no confidence motion or confidence motion of the Prime Minister requires only 50% plus 1. 50% plus 1 of those who are present and voting. Say if the strength of the House is 100, simple majority will mean if say 80 people are present 41 not 51 41 because what is required is majority of those present and voting. Absolute majority means 50% plus 1 of total membership of the House. If you have 100 members absolute majority will mean 51. Ispecial majority means 50% plus 1 of total membership of the House plus 2 third of present and voting. If you want to amend the Constitution we will discuss it in details in our last lecture when we discuss the amendability of Indian Constitution. But try to understand this if you are amending the Constitution what you require is the majority of the House and 2 third of present and voting. When it comes to President of India's impeachment mere simple majority 50% plus 1 of present and voting not sufficient. Absolute majority 50% plus 1 of total membership of the House not sufficient. 2 third of present and voting not sufficient. What you require is total membership of the House. 2 third of the total membership of the

House. And therefore this is a unique provision because removal of President of India is a very big step. And therefore you can remove the President only when impeachment motion is passed by 2 third of total membership of the House. What does the Constitution say about the Prime Minister? Prime Minister is the most powerful constitutional authority in our parliamentary democracy. He leads not only the government but also the entire nation. It is the Prime Minister who represents the aspirations of the people. Article 74 says there shall be a council of ministers with the Prime Minister at the head to aid and advise the President. The question whether and if so what advice was given by the Prime Minister shall not be inquired into in any court. How many ministers Prime Minister can have? After the 91st constitutional amendment total number of ministers including the Prime Minister shall not exceed 15% of the total number of members of Lok Sabha. So whatever is the strength of Lok Sabha, 15% of that is the number which will have council of ministers. How is Prime Minister appointed? Very interesting question. Though the Indian Constitution is the lendiest constitution of the world and though the Prime Minister is the most powerful most important constitutional functionary but our constitution does not tell us any details about the appointment of the Prime Minister. Article 75 merely says that Prime Minister shall be appointed by the President and other ministers shall be appointed by the President on the advice of the Prime Minister. How will President appoint? What considerations President will keep in mind when he is going to appoint the Prime Minister? Constitution is silent on this point. This is one of the classical silence of Indian constitution. The Prime Minister and the ministers hold their office during the pleasure of the President and then Article 75 clause 3 says, Council of ministers shall be collectively responsible to the House of People. Now Lok Sabha which is a directly elected House becomes important as House of Commons in England is important. The Council of ministers is responsible to Lok Sabha not to Rajasava. President can appoint anybody as the Prime Minister. Whether he is the member of the House or he is not the member of Parliament is not important. But every Prime Minister after appointment as Prime Minister must within six months become the member of the either House of Parliament. Ideally the Prime Minister should come from Lok Sabha. But Prime Minister Manmohan Singh was a member of Rajasava. Indra Gandhi when she was appointed for the first time as Prime Minister was the member of Rajasava. So how President appoints somebody as a Prime Minister? After Lok Sabha elections as per constitutional conventions the President has to satisfy himself that the person to whom he is inviting to form the government enjoys the confidence of the House which House Lok Sabha. If there is a clear majority for a party, President has no discretion. But if there is a confusion, if there is a hung parliament, if no party gets majority President becomes all powerful because he alone has the discretion in the appointment of Prime Minister. He may call the leader of

the single majority party or a leader of the pre-Pole Alliance or the leader of the post-Pole Alliance. What he has to see who is that person who will win the vote of confidence in Lok Sabha and such a person is to be invited to form the government. His Prime Minister just first amongst equals. This is what the classical position of Prime Minister under British Parliamentary system has been. At Prime Minister, vis-a-vis his ministers just first amongst equals. But today to say Prime Minister is merely Prima's Inter-Paris or first amongst equals does not truly reflect the Prime Minister's relationship with his ministers. As a matter of fact Prime Minister has no equals. Why? Because the council of ministers he survives or sings with the Prime Minister. If Prime Minister resigns, it automatically needs resignation of the entire ministry. When Prime Minister enjoys massive majority in Lok Sabha, then he can appoint ministers on his suit will. He can make and make ministers. He can drop anybody from his ministry. As they exercise more independence and assert more autonomy in coalition governments when Prime Minister is weak. Many a times today parliamentary election gets converted into the presidential form and people vote not for the party but for the leader whom they want to see as their Prime Minister. Is President bound by the Council of Ministers advice? Yes. Prior to 42nd Amendment, Article 74 had provided that there shall be a Council of Ministers with the Prime Minister at the head to aid an advice President in the exercise of his functions. 1976 during emergency, Mrs Gandhi brought in 42nd Amendment which laid down that the President has to exercise his functions on the aid and advice of Council of Ministers headed by the Prime Minister. So President will have no discretion. He has to simply go by the advice given by the Council of Ministers headed by the Prime Minister. In 1978, 44th Amendment was passed which provides that President may require the Council of Ministers to reconsider such advice either generally or otherwise and the President shall act in accordance with the advice tendered after such reconsideration. So 44th Amendment slightly reduced the strictness of 42nd Amendment now President of India can ask for reconsideration. If after reconsideration same advice is given then President of India is bound to accept the advice. Very rarely President's seek reconsideration but there have been notable exceptions. President Zal Singh in 1987 had sent the Indian Postal Bill for the reconsideration. Similarly President A.P.J. Kalam in 2006 had returned the Office of Profit Bill. When the same bill was resubmitted to him he had no choice but to sign it. And President K.R. Narayanan in 1997 and 1998 twice had refused to impose President's rule in a state of Uttar Pradesh and Bihar. If Indian President just a nominal head there are two schools of thoughts. One which says President is merely a nominal head or a figure head just like British Monarch who merely reigns but does not rule. Pandit Nair and all other Prime Ministers naturally are in this school. But they get lot of support from the Supreme Court because Supreme Court also believes

we are a parliamentary democracy and therefore the real power cannot be vested in the President. It has to be with the Prime Minister. The second school of thought believes Indian President is not a mere nominal head but can still higher and fire the cabinet. Dr. Rajendra Prasad and K. Munshi who was a member of Constituent Assembly are the main proponents of this school. Now this school refers to certain articles of the Constitution which give an impression that in some situations the President of India may act independently. One of their arguments is while the Prime Minister is the leader of Lok Sabha which is one of the House of the Parliament the President has a wider electoral college because in his election as we discuss few minutes back both the House of Parliament and also state legislative assembly's participate. So his representative character is greater than the Prime Minister. Then they also refer to Article 53 clause 1 which says that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him. But the last expression in this clause is important. It says in accordance with the Constitution. The argument they try to build is like this that Article 53 is saying President may exercise his powers either directly or through officers subordinate to him. But my submission is look at the last few words. It says in accordance with the Constitution. And in accordance with the Constitution will mean generally he has to act on the aid and advice he can merely ask for reconsideration once. Then they also refer to what I told you earlier to Article 60 under which President takes an oath and promises to preserve, protect and defend the Constitution and law and that he will devote himself to the service and well-being of people of India. The argument is like this if President of India has no real power, how can he preserve, how can he defend, how can he protect the Constitution, how can he submit himself to the service and well-being of people of India. Then they also argue that Article 61 says President of India can be impeached only for the violation of the Constitution. The controversy was settled to rest by the Supreme Court in Shamsha Singh versus state of Punjab. In 1974 judgment in which Justice Krishna here observed, we declare the law. Please see this expression. We declare the law because Article 141 of Indian Constitution says law declared by the Supreme Court shall be binding on all courts throughout the territory of India. So Justice Krishna here is saying, we declare the law of this branch of our Constitution to be that that the President and Governor, custodians of all executive and other powers under various articles, shall by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their ministers, save in few well-known exceptional situations. The one exceptional situation is that the Prime Minister loses majority in the house and advises President to dissolve Lok Sabha. The President is not bound to dissolve Lok Sabha on the advice of a Prime Minister who loses the no confidence motion. Though invariably, going by British conventions, the President may

accept such an advice, but he is not necessarily bound. Particularly if the Lok Sabha elections are few years away. So now after the Supreme Court judgment in Shamsha Singh, there is simply no doubt that the Indian President has to discharge his functions only on the advice of his Council of Ministers. That brings me to ordinance making powers of the President. Article 123 of Indian Constitution says, if at any time, except when both houses of Parliament are in session, the President is satisfied that circumstances exist, which render it necessary for him to take immediate action. He may promulgate such ordinances as the circumstances appear to him to require. This is executive law making. Any laws are to be made by the Parliament. Parliament is not in session. An emergency situation has come in. Immediate action is required. So Constitution has given President power to promulgate ordinances to meet that immediate emergency. An ordinance promulgated under this article shall have the same force and effect as an act of Parliament, but every such ordinance shall be laid before both houses of Parliament and shall cease to operate at the expirations of six weeks from the re-assembly of Parliament. So President may promulgate an ordinance, that ordinance will remain in operation for six weeks one and a half month. During that period, Parliament must approve the ordinance and if Parliament does not approve the ordinance, then the ordinance would last. What did we learn today? India is Parliamentary Democracy. Accordingly, our President is just a nominal head. He has to act on the aid and advice of Council of Ministers, headed by the Prime Minister. Therefore Indian President, like the British Queen, reigns, but does not rule. In emergency situations, where immediate action is required, President may promulgate ordinances. In the next lecture, we would discuss the Indian Judiciary and the appointment of judges. Thank you very much. Namashka.

Chapter 14 - Lecture 14

Lecturer: Prof. (Dr.) Faizan Mustafa

Namashkar, welcome to the online course on Indian Constitution offered by Nalusa University of Law and sponsored by Ministry of Law and Justice, Government of India. In the last lecture, we talked about union executive and today we are going to the third most important organ of our state, that is Indian judiciary. So Indian Constitution, as we had discussed earlier, is a federal constitution. Federalism has been held to be the basic structure of the Constitution. What is federalism? Federalism is all about distribution of powers between center and states. If power is allocated to two sets of governments, the disputes are bound to arise. And therefore an independent organ is required to resolve these disputes. Moreover, supremacy of the Constitution is an essential ingredient of federalism. If constitution supremacy is to be maintained, we require an independent and impartial judiciary so that it can freely, fairly and independently interpret the Constitution. For the Constitution guarantees certain fundamental rights and only an independent organ can protect these rights. And therefore, judiciary was given the role of protector and the guarantor of people's fundamental rights. As a matter of fact, true federalism under Indian Constitution is visible only in the judiciary because our high courts are not subordinate to the supreme court. Chief Justice of India is not the boss of Chief Justice and judges of the high courts. In fact, even in respect of the supreme court, Chief Justice of India is only the first amongst equals. What is judicial review? Judicial review is the power of constitutional courts to examine the constitutionality of laws and the executive's actions. Expression judicial review has not been used in the Indian Constitution. Unlike American Constitution, our Constitution does not even expressly vest judicial power in the courts. But the separation of power's principle has been incorporated as division of functions of three organs under the Constitution is abundantly clear. So judicial power in the sense of judicial power of state is clearly vested in the courts and this was so even prior to independence. So courts in India have the power to review the state action. Article 13, Article 32 and 26 of our Constitution give the power of judicial review to the supreme court and high courts to declare any legislative, executive or administrative action void if the same is in contravention of our Constitution. One big question which may be legitimately raised. If we are giving this power to the judges to sit over judgment that is seasons of democratically elected representatives of the people sitting in the parliament, is it not anti-democratic? The answer is that those judicial review may look like anti-democratic but this power has been given to ensure constitutionalism so that parliament remains within their allotted sphere and do not transgress the limits laid down by the Constitution so that the supremacy of the

Constitution is maintained and the parliament does not turn majoritarian. And before the birth of our republic, statements of Nero's stature explicitly elaborated government's view on the judicial review. On 10th September 1949 in the Constituent Assembly, this is what Nero said. Within limits no judge and no supreme court can make itself a third chamber. No supreme court and no judiciary can stand in judgment over the sovereign will of parliament. If we go wrong here and there, it can point it out. But in the ultimate analysis where the future of the community is concerned, no judiciary can come in the way. And then Nero said, and if it comes in the way, ultimately the whole Constitution is a creature of parliament. He went on to say on the possibility of picking up pro-government judges. When he said, if courts proved obstructive, one method of overcoming hurdle is the executive which is the appointing authority of judges, begin to appoint judges of its own liking for getting decisions in its own favor. Indian Constitution does not prescribe any procedure for the appointment of Chief Justice of India, but a healthy convention has been developed to appoint senior most judge as Chief Justice of India. What is judicial activism? According to Blacks Law Dictionary, judicial activism is a philosophy of judicial decision making whereby judges allow their personal views about public policy among other factors to guide their decisions. Giving a new meaning to the provision to suit the changing social or economic conditions or expanding the horizons of rights of individual is termed as judicial activism. Thus when courts assume functions of the executive and the legislature, then we call this as judicial activism. How judicial activism has worked in India? In Vishakhya versus the state of Rajasthan, 2004 judgment, the Supreme Court held in the absence of enacted law to provide for effective enforcement of basic human rights of gender equality and guarantee against sexual harassment and abuse, more particularly sexual harassment at workplaces, we lay down the guidelines and norms specified here and after for due observance at all workplaces or other institutions until the legislation is enacted for the purpose. If legislation is not in place in extraordinary situation, the Supreme Court main woke its powers under 142 and issued guidelines. If you look at the Vishakhya case, subsequently the law was eventually enacted by the Parliament and sexual harassment at workplaces, prevention, prohibition and redressal act was passed in 2013. Why Independence of Judiciary is Important? Independence of Judiciary is the hallmark of modern, liberal and democratic state. Independent Judiciary is required to maintain balance between the interests of individuals and society. One task in his book, Spirit of Laws, had said, there is no liberty if power of judging be not separated from the legislative and the executive powers. An independent judiciary is therefore the sign que non of vibrant democratic system, only an impartial and independent judiciary can stand as a bulwark for the protection of rights of the individuals and need out even handed justice without fear of favor. In SP Gupta Vars' Union of India, 1982

Judgemento, Supreme Court held judges should be of a stern stuff and tough fiber, unbending before power, economic or political and they must uphold the core principle of rule of law which says, be you ever so high, the law is above you. This is the principle of Independence of Judiciary which is vital for the establishment of real participatory democracy, maintenance of rule of law as a dynamic concept and delivery of justice to the vulnerable sections of community. It is this principle of Independence of Judiciary which we must keep in mind while interpreting the relevant provisions of the Constitution. This is what Supreme Court said in SP Gupta. How Independence of Judiciary has been ensured by the Constitution? The independence and impartiality of the judiciary are not private rights of judges, we should not live under this confusion. Independence of Judiciary is not the right of judges, it is the right of the citizens. Ultimately, judicial legitimacy and power rest on public confidence in the courts, in the judges themselves and in their decisions. And therefore, it is the duty of the court to ensure that people's confidence and trust in them is not eroded. Independence of Judiciary is in fact the most cherished goal of any legal system and the process of appointment of judges is rightly seen as a crucial mechanism to achieve this goal. How do we protect judges? Ensure their independence. Their salaries cannot be varied and reduced except during financial emergency. They have been given security of tenure. So their impeachment process has been made very difficult. Judges of Indian Supreme Court and High Court can be removed only through impeachment on grounds of prove misbehavior or incapacity. Let us now come to the crucial question. Independence of Judiciary will be preserved if the appointment process of judges is fair and transparent. Indian Supreme Court, as you know, is the most powerful court in the world. It has 33 plus 1 judges. Originally article 124 of the Constitution had provided 7 plus Chief Justice of India, 7 plus 1. But 124 gave power to the Parliament to prescribe a larger number. Accordingly, Parliament enacted the Supreme Court number of judges Act 1956, which provided the maximum of 10 judges. Article 124 says that judges of Supreme Court would be appointed by the President after consultation with such judges of Supreme Court and High Court as President may deem necessary. Then it says, but the Chief Justice of India shall always be consulted in the appointment of judges. How the Collegium System came into being? As for Article 124, President has to merely consult Chief Justice of India and such other judges of Supreme Court and High Court's He Deem's Necessary. Supreme Court has itself held in SP Gupta Vs Union of India in 1981, that President is not bound by the advice of CJI and other judges. He has to consult and after consultation he can take his decision. Therefore, if you look at Article 124, we had primacy of the executive in the appointment of judges in the first four decades of our republic. But subsequently, Supreme Court in Supreme Court advocates on record association 1993. And then in 1998, in the presidential

reference, observe that President is bound by the recommendation of the Collegium of Chief Justice of India plus four senior most judges. This is how Collegium was born. How Collegium System has worked. When judges are appointing judges, ideally the system should have ensured timely appointment of more competent, independent and fearless judges. But a closer scrutiny of Collegium's decisions reveal that at times their decisions are as unpredictable as English weather. There is neither any transparency nor any accountability. One may say that the constitution favors a wider consultative process in the appointment of judges of Supreme Court. In my view, there is a great merit in this provision. Wisdom is not the monopoly of few chosen ones in the apex court. We have great judges in our high courts. If President wants, he should have a right to consult them. Accordingly, to remedy this situation, in 2014, Government of India brought in National Judicial Appointment Commission Act and also amended the constitution. But in 2016, Supreme Court struck down the Constitutional Amendment and the NJC Act on the ground that it undermines the primacy of the opinion of Chief Justice of India, which the Supreme Court said is the basic structure of the Constitution. Thus to conclude, we can say that independence of judiciary is important for any democratic country. Judicial review is a mechanism to ensure supremacy of the Constitution. Judicial activism is not good as it goes against separation of powers, doctrine and Supreme Court through judicial activism should never cross what is called constitutional boundary. Because then it will negate the principles of separation of powers and principles of constitutionalism. Supreme Court does not have a role in the governance of the country, that is the role assigned to the government. In the next lecture, we would discuss Parliament's power to amend the Constitution. Thank you very much. Namashka.

Chapter 15 - Lecture 15

Lecturer: Prof. (Dr.) Faizan Mustafa

Namaskar, welcome to online course on Indian Constitution offered by Nal sir University of Law and sponsored by Ministry of Law and Justice, Government of India. We are now in our last lecture, this is the 15th lecture where we are going to discuss the constitutional amendments, who has the power to amend the constitution? Can fundamental rights be amended? What is the basic structure? How basic structure doctrine has been used? So, first of all, why power to amend the constitution is necessary? No constitution can anticipate all the future problems and the challenges which will come in future and provide solutions for them. Change is the only permanent thing and socio-economic and political conditions of every country do change over time. No one generation can claim the monopoly of wisdom. Every generation is entitled to take some decisions on its own. A constitution to be a living organism must be dynamic. And therefore, a dynamic constitution must provide for the amendments. How constitutions are changed or amended? There are two methods, formal and informal. In the formal method, you have constitutional amendments. A rigid constitution cannot be easily amended. Its amending process would be extremely difficult and cumbersome. United States Constitution is the classic example of a rigid constitution and therefore, it has seen very few amendments. It has been amended only 27 times in over 200 years. New Zealand's constitution is the most flexible constitution of the world and in New Zealand, constitutional amendments are passed just like ordinary laws. In last 120 years, Australian constitution 2 was amended just 8 times. In Switzerland, no amendment can be made to the constitution without a referendum. When you come to India, we have amended our constitution 105 times in last 71 years. Now come to the informal method of constitutional change. Constitutions are also amended through constitutional conventions and judicial interpretations. The practice of inviting the leader of the single largest party in case of hung parliament or legislative assembly amounts to the amendment of the constitution as we have discussed that the constitution does not specify whom the governor or the president would invite to form the government. Supreme Court's decision-restricting parliaments power to amend the constitution through basic structure was nothing but an informal amendment of the constitution. Collegium's right to recommend names for the judicial appointments is another instance of informal constitutional amendment. What types of amendments Indian constitution provide for? There are three types of amendments. There are amendments which are not called amendments such as creation of new states or change of names and boundaries of states under articles 3 and 4, a abolition of legislative councils in states article 169. These amendments are

passed by simple majority and they as I said are not called an amendment even though they amend the constitution. The second type are the amendments that are passed by the parliament by the majority of the haws and two thirds of present and voting most of the constitutional amendments are made through this process. The third type of amendments are the amendments where in addition to the amendment being passed by the parliament we require ratification by half of the states. In Kihutu Hulaun, Supreme Court has held that this anti-defection law which aus the jurisdiction of the courts is unconstitutional because the ratification process was not done. Does the Indian constitution give power to amend the constitution to the parliament? If you look at the original article 368, its marginal note titled it as procedure for amendment of the constitution. The 24th amendment of 1971 changed this marginal note of article 368 and it now provides power of parliament to amend the constitution and procedure thereafter. 24th amendment also said notwithstanding anything in this constitution parliament may in exercise of its constitute power amend by way of addition variation or repeal any provision of this constitution in accordance with the procedure laid down in this article. The crucial word is constituent power. The article 368 clause 5 says it is hereby declared that there shall be no limitation whatever on the constituent power of parliament to amend by way of addition, variation or repeal the provisions of the constitution. Can fundamental rights be amended? You may recall we had discussed in our lecture on the relationship between fundamental rights and directive principles that fundamental rights are basically negative restrictions on the power of the state. Every state therefore would like to delete or restrict the guarantee of fundamental rights. Parliament's power to amend the fundamental rights therefore has seen the most fascinating struggle for supremacy between Supreme Court and Parliament. The question before the Supreme Court as early as 1951 was raised in Shankariprasad versus Union of India when the validity of first constitutional amendment of 1951 was challenged in the context of insertion of article 31A and 31B. It was argued that since article 13 clause 2 prohibits an enactment of any law that contravenes fundamental rights even a constitutional amendment cannot violate fundamental rights. The court rejected this argument and held that an amendment is not law as the same is passed in woking constituent power rather than ordinary legislative power. Then the 17th constitutional amendment that added number of laws to the 9th schedule was challenged in surging Singh. If a law is added to the 9th schedule then courts do not have the power of judicial review. Three of the five judges, Chief Justice of India, Gajendra Guttkar, Justice Vantu, Justice Deyal, without any reservation re-treated the law laid down in Shankariprasad. But two judges that is Justice Hiddaya Tullar and Justice Mudolkar in their separate conquering opinions expressed doubts on the Parliament's absolute power to amend the fundamental rights. A conflict between Parliament and Supreme Court dominated the

constitutional debates in 1960s and 70s and therefore we saw the Supreme Court restricted Parliament's power to amend the Constitution. In *Shankariprasad and Sajjan Singh*, Supreme Court accepted the supremacy of the Parliament and trusted the Parliament to amend any provision of the Constitution because Parliament consisted of great freedom fighters, great leaders who led our national freedom struggle. But by 1967 this faith in Parliament is to eroded and the conflict reached its climax in *Golakhnath versus the state of Punjab* in which Supreme Court tried to apply the breaks on the Parliament's absolute power to amend the Constitution. In a sharply divided verdict, Supreme Court by a majority of six to five overruled earlier decisions of *Shankariprasad and Sajjan Singh* and took fundamental rights outside the Parvi of the amending powers of the Parliament. How the Supreme Court denied Parliament power to amend the Constitution? The Court held in *Golakhnath* that fundamental rights are basically the implied limitations on the Parliament's power to amend the Constitution. The power to amend fundamental rights the Court said has not been specifically given to Parliament. The apex court held that article 368 does not confer on Parliament the power to amend the Constitution. It merely provides the procedure of the amendment. The power to amend the Constitution, Supreme Court said is found in the plenary legislative power of Parliament as is clear from articles 245 to 46 and 248 and entry 97th of list which gives the residue power to the Parliament and the Court said this Resudary Power includes the power to amend the Constitution. The Court held the term law in article 13 includes an amendment and therefore fundamental rights are beyond the power of the amendment. If fundamental rights are to amend it, *Golakhnath* said a constant assembly is to be convened. The only good news for the government from *Golakhnath* was that the 11 judge bench made this historic decision prospective through the doctrine of prospective overruling and therefore earlier amendments were not invalidated. Now let us see how Parliament responded to *Golakhnath* judgment. To nullify this judgment, Parliament passed the 24th amendment in 1971 and made some vital and crucial changes in article 368. 24th amendment added clause 4 to article 368 which now provides that nothing in article 13 shall apply to a constitutional amendment. So if constitutional amendment is not law, it cannot be challenged on the ground of contravening fundamental rights. The marginal note of article 368 was substituted with power of Parliament to amend the Constitution and procedure you would recall in *Golakhnath*, just as Subharao has said that article 368 is talking of procedure, not the power of the amendment. Therefore now they changed it to power of Parliament to amend the Constitution. The opening paragraph of article 368 was now numbered as clause 1 and it provided that Parliament may in exercise of its constituent power, amend by way of addition, variation or repeal any provision of this Constitution. Thus constituent power and legislative power were distinguished. Even President of

India was denied power to refuse ascent to a constitutional amendment. Parliament may in exercise of its constituent power, amend by way of addition, variation or repeal any provision of this Constitution. This was also clarified as removal of doubts. How did Supreme Court respond to Parliament's 24th amendment? You had two extremes. One was Shankri Pasaat and Sajjan Singh, where Supreme Court said Parliament can amend any provision of the Constitution including fundamental rights. This was one extreme. The other extreme was Golakhnath, which said Parliament cannot amend fundamental rights. If you want to amend fundamental rights, you need a constituent assembly. The 24th, 25th, 29th amendments also tried to abridge or take away fundamental rights and therefore Supreme Court was again confronted with the question of Parliament's power to amend the Constitution in Keshavan and the Bharati versus the State of Kerala. 1973 judgment. 13 judges bench, which was constituted to decide Keshavan and the Bharati is the largest bench of our judicial history. Marathon hearing was held. The court upheld the validity of the 24th amendment and accepted the position that Parliament can amend any provision of the Constitution including fundamental rights. What is the basic structure doctrine? But seven out of 13 judges held that this power of the Parliament to amend the Constitution is not absolute and Parliament does not have the power to alter what they call the basic structure of the Constitution. Six judges excluding justice HR Khanna held fundamental rights are part of basic structure and therefore cannot be amended. The court did not give any definition of basic structure but chief justice C. Cere by way of illustration said following are included within basic structure. Supremacy of Constitution, Republican and Democratic form of government, secular character of the Constitution, separation of powers, federal character of the Constitution. Then in Indra Nehru Gandhi versus Raj Narayan in 1975 judicial review was held as part of the basic structure. How basic structure doctrine has been used? In IR Kohello versus the State of Tamil Nadu 2007 Suprem court held all amendments made after Keshavan and the Bharati that is April 24, 1973 even though included in 9th schedule are subject to judicial review. You may recall any amendment which is or any law which is included in 9th schedule is set to be outside the power of judicial review. Then in SR Bombay doctrine of basic structure was strangely extended to executive acts and the dismissal of few state governments was upheld under Article 356. In M Nagraj versus Union of India 2006 judgment Suprem court now tried to give a general definition of basic structure by mentioning two tests which will help us in determining what is basic structure. These two tests were the width test and the identity test. The court said that any amendment that changes the wider principles such as democracy, secularism, equality and that which changes the identity of the constitution shall not be permissible. So you have to see whether the wider principles are compromised or whether the

identity of the constitution is altered. If this is so then it is a violation of basic structure doctrine. What did we learn today? We learned that times are not static and therefore constitutional amendments are necessary. Parliament must have the power to amend the constitution. Indian constitution has three types of amendments. Parliament can amend any provision of the constitution including fundamental rights but Parliament cannot destroy the basic structure of the constitution. With this we come to an end of this course. We hope that each one of you would uphold constitutional values and fulfill our fundamental duties. There will be some opportunity for us to come back to you again in some other lecture series. Thank you very much. Jai Hind Namashka.

